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In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

MARCIANO HAW HIBI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-9a) is reported at 475 F. 2d 7. The order and findings of the district court (App. C, *infra*, pp. 11a-25a), and the findings and recommendation of the designated naturalization examiner (App. D, *infra*, pp. 26a-49a) are not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 10a) was entered on February 8, 1973. On April 27, 1973, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to June 8, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the principle of estoppel is applicable against the government so that a Philippine national whose right to American citizenship expired in 1946 is nonetheless now entitled to such citizenship because during the time in question the American authorities did not specifically advise him of his eligibility to apply for naturalization and withdrew from the Philippines the designated immigration representative to whom he could have applied for naturalization.

STATUTES INVOLVED

1. Sections 701, 702, and 705 of the Nationality Act of 1940, 56 Stat. 182, *et seq.*, as amended, 8 U.S.C. (1940 ed., Supp. V) 1001, 1002, 1005, provided in pertinent part: [1]

> Sec. 701. * * * [A]ny person not a citizen regardless of age, who has served or hereafter serves honorably in the military or naval forces

[1] The Nationality Act of 1940 was repealed by Section 403(a)(42) of the Immigration and Nationality Act of 1952 (66 Stat. 280).

of the United States during the present war and Who shall have been at the time of his enlistment or induction a resident thereof and who (a) was lawfully admitted into the United States, including its Territories and possessions, or (b) having entered the United States, including its Territories and possessions, prior to September 1, 1943, being unable to establish lawful admission into the United States serves honorably in such forces beyond the continental limits of the United States or has so served may be naturalized upon compliance with all the requirements of the naturalization laws except that (1) no declaration of intention, no certificate of arrival for those described in group (b) hereof, and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet any educational test; * * * *Provided, however*, That * * * (3) the petition shall be filed not later than December 31, 1946. * * *

Sec. 702. During the present war, any person entitled to naturalization under Section 701 of this Act, who while serving honorably in the military * * * forces of the United States is not within the jurisdiction of any court authorized to naturalize aliens, may be naturalized in accordance with all the applicable provisions of section 701 without appearing before a naturalization court. The petition for naturalization of any petitioner under this section shall be

made and sworn to before, and filed with, a representative of the Immigration and Naturalization Service designated by the Commissioner or a Deputy Commissioner, which designated representative is hereby authorized to receive such petition in behalf of the Service, to conduct hearings thereon, to take testimony concerning any matter touching or in any way affecting the admissibility of any such petitioner for naturalization, to call witnesses, to administer oaths, including the oath of the petitioner and his witnesses to the petition for naturalization and the oath of renunciation and allegiance prescribed by section 335 of this Act, and to grant naturalization, and to issue certificates of citizenship: * * *.

Sec. 705. The Commissioner, with the approval of the Attorney General, shall prescribe and furnish such forms and shall make such rules and regulations, as may be necessary to carry into effect the provisions of this Act.

2. Section 310(e) of the Immigration and Nationality Act of 1952, as added, 75 Stat. 656, 8 U.S.C. 1421(e), provides:

Notwithstanding the provisions of section 405 (a), any petition for naturalization filed on or after September 21, 1961, shall be heard and determined in accordance with the requirements of this subchapter.

STATEMENT

Respondent filed his petition for naturalization in the United States District Court for the Northern District of California on September 13, 1967. The district court, rejecting the negative recommendation

of the naturalization examiner designated by the Attorney General pursuant to 8 U.S.C. 1446, granted the petition (App. 11a-25a). The court of appeals affirmed (App. 1a-9a).

1. Respondent, a native of the Philippines, was born in Manila in 1917 (App. 27a). In February 1941 he enlisted in the Philippine Scouts, a unit that was part of the United States Army.[2] See *Miguel* v. *McCarl*, 291 U.S. 442. Respondent was taken prisoner by the Japanese at Corregidor in 1942 and released after six months' internment. After the liberation of the Philippines by Allied forces, he rejoined the Scouts in April 1945 and served until his discharge on December 6, 1945. (App. 5a, 12a, 15a.)

The Nationality Act of 1940, as amended, provided special conditions for the naturalization of non-citizens who served in the Armed Forces of the United States during World War II. Section 701 of the Act exempted certain alien servicemen who served honorably beyond the continental limits of the United States from some of the usual requirements for naturalization, including literacy in English and a period of residence in the United States. As amended by the time in question in this case, however, the Act specified that all petitions under it had to be filed no later than December 31, 1946. Section 702 provided for the naturalization *overseas* of persons eligible

[2] The Scouts were thus distinct from the Army of the Commonwealth of the Philippines, a much larger force under the control of the Philippine Government until ordered into the Armed Forces of the United States by President Roosevelt on July 26, 1941.

for expedited naturalization under Section 701 who, while serving honorably in the military, were beyond the jurisdiction of the American naturalization courts. Under Section 702, representatives designated by the Commissioner of Immigration and Naturalization were authorized to receive petitions, conduct hearings, and grant naturalization outside the United States. Section 705 provided that the Commissioner, with the approval of the Attorney General, should make such rules and regulations as were necessary to effect the provisions of the Act.

Naturalization of alien servicemen in the Philippines was impossible during the Japanese occupation. The liberation of the Philippines by Allied forces began in February 1945. In that year, officials of the Immigration and Naturalization Service resolved two problems of statutory interpretation involving the eligibility of Filipino servicemen for naturalization under Sections 701 and 702. One question was whether members of the Army of the Commonwealth of the Philippines qualified under the statute. The Immigration and Naturalization Service concluded that they did. The second question concerned the eligibility of Filipinos who had never resided in the United States. The Attorney General ultimately concluded that prior residence in the Philippines, then an American possession, satisfied the statute's requirements on that subject. (App. 15a-16a.)

With those two questions resolved, the Immigration and Naturalization Service, in early August 1945, designated George Ennis, an American vice-

consul in Manila, to naturalize aliens pursuant to Section 702. Almost immediately, the Philippine government informally expressed its concern to the State Department about the possibility that large numbers of young Filipino men, perhaps as many as 250,000, would be naturalized and leave for America on the eve of Philippine independence, which was scheduled for July 4, 1946. (App. 16a.)

On September 13, 1945, the Commissioner of Immigration and Naturalization recommended to the Attorney General that the situation might best be handled by revoking the authority previously granted to Ennis. The Commissioner noted in his letter that he believed Ennis had not yet exercised his authority. The Attorney General approved the Commissioner's recommendation on September 26, 1945, and Ennis's authority to naturalize alien servicemen was thereafter revoked. Naturalizations ceased by October 27, 1945. (App. 5a-6a, 16a-17a.)

The Immigration and Naturalization Service subsequently reconsidered and abandoned its position that members of the Commonwealth Army were eligible for naturalization under Sections 701 and 702.[3] In August 1946, eight months after respondent's discharge from the Philippine Scouts, the Service designated another naturalization representative for the

[3] This redetermination was based on the First Supplemental Surplus Appropriation Rescission Act, 1946, 60 Stat. 6, 14, which provided in part that service in the Army of the Commonwealth of the Philippines was not to be deemed service in the United States Armed Forces for purposes of any United States statute conferring benefits on military veterans.

Philippines. The representative remained there until December 1946, and naturalized many Philippine Scouts who were still on active duty at that time and thus still eligible under Section 702. (App. 6a, 18a.)

According to a finding by the district court, respondent was never advised, during his service in the armed forces, of his right to apply for naturalization pursuant to the Nationality Act of 1940, and if he had been so advised he would have made application (App. 24a). Respondent claims that he first learned he had missed his opportunity for naturalization when he returned to Manila in late 1946 or early 1947 after having spent some time in an outlying province following his discharge (App. 5a).

2. Respondent entered the United States for the first and only time on April 25, 1964, on a visitor-for-business visa, which expired on June 30, 1964. On September 13, 1967, he petitioned for naturalization under Sections 701-705 of the Nationality Act of 1940 (App. 2a).

The naturalization examiner recommended denial of the petition on the grounds that (1) it was filed 21 years after the statutory deadline; (2) Section 310(e) of the present Immigration and Naturalization Act (8 U.S.C. 1421(e)) precludes naturalization except in accordance with current law; and (3) there was no reason on the facts of this case to impose an estoppel against the government (App. 36a-46a).

The district court nevertheless granted the petition, and the court of appeals affirmed. The court of ap-

peals held that the failure to advise respondent of his eligibility to apply for naturalization and the revocation of Ennis's authority as naturalization representative in 1945 violated the statutory mandate and deprived respondent of "a fair opportunity to apply for naturalization during the only time he could apply" (App. 7a). It ruled that the government is therefore "estopped from alleging * * * that the filing deadline set forth in section 701 has passed, or that denial of the petition is required by section 310 (e) of the present Immigration and Nationality Act" (App. 8a).

REASONS FOR GRANTING THE WRIT

The decision below involves an unprecedented and erroneous application of equitable estoppel against an agency of the government, the effect of which is to nullify a provision of the present immigration law that requires naturalization petitions to be determined under current requirements. The decision directly affects, at the least, thousands of former Philippine Scouts and their families, and indirectly affects thousands of other Filipino nationals whose wait for immigrant visas may be lengthened because of the likely increase in first preference visa applications, if the decision below stands. Because the decision implicates the immigration status of so many persons, and because the case presents an important issue in the administration of the Act, review by this Court is warranted.

1. The court of appeals' application of equitable estoppel against the Immigration and Naturalization Service apparently rests upon two grounds. First, the military authorities failed to give respondent actual notice of his eligibility to apply for naturalization while he was serving in the Scouts (App. 9a). Second, the Commissioner of Immigration and Naturalization failed to make a representative available to naturalize respondent (and others) while he was still serving in the armed forces (App. 7a). We contend that the court erred in concluding that these "failures" were in derogation of some duty owed to respondent. But even if a statutory duty were breached, it would be inappropriate to apply the doctrine of equitable estoppel in the circumstances of this case.

a. The court of appeals determined that "procedures * * * to notify non-citizens in a position similar to that of [respondent] of their right to apply for naturalization * * * were not effectively carried out" (App. 9a). But nothing in the Nationality Act of 1940 required that each eligible member of the armed forces be given actual notice of his eligibility. In September 1944 a War Department circular was issued stating that non-citizens should, as a matter of practice, be so notified at the time of induction and upon arrival at their first duty station.[4] That

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[4] War Department Circular No. 382, issued September 21, 1944, stated in part:

> Commanding officers of all echelons will designate an appropriate individual, properly instructed, to inform noncitizens of their right to apply for citizenship, to

procedure, however, was not prescribed until more than three years after respondent enlisted in the armed forces and was expressly applicable only to non-citizens serving within the jurisdiction of naturalization courts.[5]

Even if there were an implied statutory duty to notify all non-citizens of their eligibility, that duty surely would not be absolute. In time of war it would be difficult to ensure that every person is properly informed of his statutory rights. In an area such as the Philippines, which was occupied by enemy forces for much of the war, and where military units were organized as guerrilla outfits, it would be practically impossible. The designated naturalization examiner in this case properly found (App. 42a)—and her finding was not contradicted by either court below—that the authorities made good faith efforts to notify non-citizens of their eligibility. There is no reason to

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assist such persons who desire to make application, and to expedite by all possible means completed action on the application. * * *

* * * *

All aliens found acceptable for military service will be informed at armed forces induction stations of their right to apply for United States citizenship * * *. All noncitizens upon their arrival at the first post, camp, or station after a reception center will be advised of their right to apply for citizenship and there will be entered in * * * the enlisted man's service record whether or not the individual desires to apply. * * *

[5] The provisions were part of "[t]he general procedure to accomplish naturalization of noncitizens serving in continental United States, Alaska, Hawaii, Puerto Rico, or the Virgin Islands of the United States * * *."

impose upon them the greater duty of providing actual notice to each eligible person individually.

The court of appeals also found that the Commissioner had a "duty to this petitioner to make a representative available to naturalize non-citizen applicants while they were still serving in the armed forces" (App. 7a). But the statute does not support this assertion either. Section 702 authorized the designation of representatives to grant naturalization to members of the armed forces outside the jurisdiction of the naturalization courts, and Section 705 directed the Commissioner to "make such rules and regulations, as may be necessary to carry into effect the provisions of this Act." There is no basis for inferring from these general provisions—as did the court of appeals—that the government had an obligation to make a representative available to naturalize every eligible alien serving anywhere in the Armed Forces of the United States. In the context of a global war, no such obligation could have been intended or met.

Properly understood, Section 705 vested in the Commissioner and the Attorney General the discretion to determine when, where, and for how long designated representatives would entertain naturalization petitions. That discretion was not abused. More than 70 representatives were designated to grant naturalization outside the United States (App. 40a), and between 1943 and 1946 a number of representatives travelling from post to post conducted naturalization proceedings in numerous places, including Eng-

land, Iceland, Egypt, Iran, North Africa, the Philippines, and many islands of the Pacific (App. 30a). In some theaters of the war, naturalization representatives were never designated. The first representative in the Philippines naturalized several hundred persons in 1945, the year in which respondent was discharged from the Scouts, and the second representative naturalized some 4,000 persons in 1946 (App. 42a).[6]

The Act did not require the Commissioner and the Attorney General, in exercising their discretion under the Act, to ignore compelling foreign policy considerations, including the wishes of the country whose nationals would be affected. The determination here —to withdraw temporarily the designated representative for the Philippines—was a reasonable accommodation of the statutory policy and the overriding principles of international comity. In making the decision that was followed, the government violated no duty owed to respondent. Cf. *Tai Mui* v. *Esperdy*, 371 F.2d 772 (C.A. 2), certiorari denied, 386 U.S. 1017, and *Cheng Ho Mui* v. *Rinaldi*, 408 F.2d 28 (C.A. 3), both upholding the discretionary designation of offices to receive applications for conditional entry under 8 U.S.C. 1153(a)(7).[7]

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[6] From 1942 through 1948 nearly 18,000 Philippine nationals were naturalized, in the United States or elsewhere, pursuant to Sections 701 and 702 of the 1940 Act (Annual Reports, Immigration and Naturalization Service, 1942-1948).

[7] Furthermore, it is difficult to see how respondent could have been prejudiced by the withdrawal of the designated

b. Even if the military authorities or the Commissioner violated a duty owed to respondent, there is no basis for the application of equitable estoppel. The traditional rule is that "one who makes a representation to another who reasonably relies to his detriment is estopped to deny the truth of the representation or to gain by taking a position inconsistent with the representation." 2 Davis, *Administrative Law Treatise*, § 17.01, p. 491 (1958). The doctrine has traditionally been viewed as inapplicable as against the government,[8] and, while some lower courts have departed from that view in special circumstances, the question remains open in this Court. See *Montana* v. *Kennedy*, 366 U.S. 308, 314-315.

Assuming *arguendo* that an estoppel may in a proper case be raised against the government, this is not the proper kind of case to uphold it. First, the effect of the decision below is to nullify 8 U.S.C. 1421(e), which provides that "any petition for naturalization filed on or after September 21, 1961, shall be heard and determined in accordance with the requirements of this subchapter." It is not enough to say that the government may not assert the applicability of Section 1421(e). The court is without authority to grant a petition except on the basis of

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representative if, as he asserts, he did not become aware of his eligibility until it had terminated.

[8] See, *e.g.*, *Wilber National Bank* v. *United States*, 294 U.S. 120, 123-124; *Jeems Bayou Club* v. *United States*, 260 U.S. 561, 564; *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409; *Pine River Logging* v. *United States*, 186 U.S. 279, 291; *Hart* v. *United States*, 95 U.S. 316, 318.

current law, and the government's silence, whatever other effects it may have, surely cannot enlarge the court's statutory authority, in a matter expressly entrusted to Congress by Article I, Section 8, clause 4 of the Constitution.[9]

Second, if an equitable estoppel may ever operate against the government, it should apply only to situations in which the government acts in its proprietary, as opposed to its sovereign, capacity. As Professor Davis has stated: "[T]he principles of fairness [equitable estoppel] worked out to govern business dealings seem fitting for the government's business dealings in writing insurance, but are not necessarily fitting for the government's activities in drafting men and in admitting aliens to citizenship, activities that have no counterpart in the affairs of private parties." 2 Davis, *supra*, § 17.02, p. 504.

Third, since the government has not sought to deny any earlier express or implied assertion upon which respondent relied, there is no occasion to apply the traditional rule of estoppel. It might be a different case if immigration officials had erroneously assured respondent prior to his discharge that he need not file a petition then because he could forever retain his eligibility under the 1940 Act. In those circumstances, the government might, if it were subject to the usual rule, be held estopped to deny the truth of its earlier representation. There was no comparable affirmative representation here. Unlike the cases re-

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[9] "The Congress shall have Power * * * To establish a uniform Rule of Naturalization * * *."

lied upon by the court of appeals, the government here did not give respondent affirmatively misleading information upon which he relied to his detriment. See *Tejeda* v. *Immigration and Naturalization Service*, 346 F.2d 389 (C.A. 9); *Hetzer* v. *Immigration and Naturalization Service*, 420 F.2d 357 (C.A. 9); *Gestuvo* v. *District Director*, 337 F. Supp. 1093 (C.D. Cal.). Nor did it engage in any "misconduct" (*Montana* v. *Kennedy*, *supra*, 366 U.S. at 314) such as might prevent it from relying on the fruits of its misfeasance.

Fourth, an estoppel is not proper where the party claiming it is himself guilty of laches. Respondent, by his own admission, waited more than 20 years from the time he discovered his eligibility had expired until the time he filed for naturalization. It is hardly surprising that after so long a period the government is unable to contest his claim that he was not notified of his rights and would have sought citizenship had he been properly advised.

Thus, in light of the general importance of the legal question involved here, applying the principle of estoppel to the government in a wholly unjustified setting, review by this Court is warranted.

2. The decision below will also have a considerable practical impact on the immigation status of thousands of Philippine nationals and perhaps on the status of the nationals of other countries as well. The immediate practical effect of the decision is to make eligible for expedited naturalization, pursuant to the long-ago repealed provisions of the Naturaliza-

tion Act of 1940, all those former Philippine Scouts who, like respondent, were discharged before the second naturalization representative was designated in 1946. Though some of those men might have been aware of their eligibility in time to apply for naturalization during the brief tenure of the first representative in 1945, it is doubtful whether the government will be in a position after so many years to refute claims that no advice was given.

The State Department estimates that there are some 33,000 living former Scouts who might be affected by the decision below. In the State Department's view, many or even most of those individuals would seek naturalization at this time, not necessarily for their own benefit or to stay in the United States, but for the benefit of their unmarried sons and daughters, who would be entitled to first preference priority for immigrant visas following naturalization of their fathers. 8 U.S.C. 1153(a)(1). The State Department estimates that 30,000 to 80,000 applications for sons and daughters of former Scouts might ultimately be filed as a consequence of the decision below.[10] These applications for first preference

[10] The figures were derived as follows. Of the 33,000 former Scouts, it is estimated that about half, or 15,000, have unmarried children and would be eligible for naturalization. Because of the large family size in the Philippines, it is estimated that each naturalized citizen would account for an average of at least two and as many as five or more applications on behalf of unmarried sons and daughters.

Of course, the numbers would be higher if former members of the Commonwealth Army were also deemed eligible to

priority would, of course, have a substantial impact upon other Philippine nationals who are awaiting visas in accordance with normal procedures. The annual numerical limitation for immigrant visas for Filipinos is presently 20,000. The "first preference" priority given to unmarried sons and daughters of American citizens would place the children of naturalized former Scouts, like respondent, ahead of many other Filipinos awaiting immigrant visas.

Moreover, the rationale of the decision below is not limited to the Philippines but would appear to apply to any case in which a non-citizen member of the armed forces during World War II claims that he was not personally notified of his eligibility for expedited naturalization or that a designated representative was not made available to naturalize him during the period of his service. There is no way to estimate how many additional persons might be thus affected, but it is obvious that the decision below will have a substantial impact on the administration of the immigration and naturalization laws.

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apply for naturalization, a question not directly involved in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
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JUNE 1973.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 72-1562

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT-APPELLANT

vs.

MARCIANO HAW HIBI, PETITIONER-APPELLEE

[February 8, 1973]

Appeal from the United States District Court
for the Northern District of California

Before: BARNES and TRASK, Circuit Judges, and EAST,* District Judge

TRASK, Circuit Judge:

This is an appeal from an order granting the petition for naturalization of Marciano Haw Hibi, a Philippine native, over the recommendation of the Naturalization Examiner of the Immigration and Naturalization Service that the petition be denied. The basis for the petition was Hibi's service in the

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* Honorable William G. East, Senior United States District Judge, District of Oregon, sitting by designation.

Armed Forces of the United States during its war with Japan.

The issues on appeal involve the discretion, if any, invested in the Commissioner of Immigration and Naturalization and the Attorney General under section 705 of the Naturalization Act of 1940. Also, whether the Immigration Service failed in its duty to carry into effect the purposes of section 702 of the Act, and thus should be estopped from asserting delay in filing as a basis on which to reject this petition for naturalization.

Hibi, the petitioner, entered the United States on April 25, 1964, as a temporary business visitor. On September 13, 1967, he petitioned for naturalization under sections 701-705 of the Nationality Act of 1940,[1] based upon his military service in the Armed

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[1] Pertinent portions of Sections 701, 702 and 705 of the Act are as follows:

> "Sec. 701. . . . [*A*]*ny person* not a citizen regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war and who shall have been at the time of his enlistment or induction a resident thereof and who (a) was lawfully admitted into the United States, including its Territories and possessions, or (b) *having entered the United States, including its Territories and possessions, prior to September 1, 1943, being unable to establish lawful admission into the United States serves honorably in such forces beyond the continental limits of the United States or has so served, may be naturalized upon compliance with all the requirements of the naturalization laws except that* (1) no declaration of intention, no certificate of arrival for those described in group (b) hereof, and no period of residence within the

Forces of the United States. The Naturalization Examiner found the petitioner to be ineligible under sections 701 and 702 of the Nationality Act of 1940.

The district court ordered that the petition be granted, finding the petitioner eligible under section

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United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet any educational test; . . ."

"Sec. 702. *During the present war, any person entitled to naturalization under section 701 of this Act, who while serving honorably in the military . . . forces of the United States is not within the jurisdiction of any court authorized to naturalize aliens, may be naturalized in accordance with all the applicable provisions of section 701 without appearing before a naturalization court.* The petition for naturalization of any petitioner under this section shall be made and sworn to before, and filed with, a representative of the Immigration and Naturalization Service designated by the Commissioner or a Deputy Commissioner, which designated representative is hereby authorized to receive such petition in behalf of the Service, to conduct hearings thereon, to take testimony concerning any matter touching or in any way affecting the admissibility of any such petitioner for naturalization, to call witnesses, to administer oaths, including the oath of the petitioner and his witnesses to the petition for naturalization and the oath of renunciation and allegiance prescribed by section 335 of this Act, and to grant naturalization, and to issue certificates of citizenship: . . ."

"Sec. 705. The Commissioner, with the approval of the Attorney General, shall prescribe and furnish such forms, and shall make such rules and regulations, *as may be necessary to carry into effect the provisions* of this Act." (Emphasis supplied)

702 of the 1940 Act. The issue there, as here, concerned the timing of the filing of the petition, since it was filed long after the expiration of section 702 (December 31, 1946), and subsequent to the enactment of section 310(3) of the present Immigration and Nationality Act which precludes the naturalization of anyone except in accordance with present requirements.[2]

Section 702 was a measure which offered American citizenship to non-citizens serving in the Armed Forces of the United States overseas during World War II who, by reason of their overseas service, were not free to appear before a regular naturalization court in the United States. The district court expressly found that the petitioner had never been advised of his right to be naturalized while he was on active duty with the United States Army, the only time during which he could have qualified under section 702, and that he would have applied had he known of the opportunity and were the means available for him to apply. The trial court concluded that the Immigration Service failed in its duty to effectuate the provisions of section 702, and thus deprived the petitioner of a fair opportunity to apply for naturalization. Acting on principles of equity, the

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[2] Section 310(e) of the present Immigration & Nationality Act, 8 U.S.C. § 1421(e) provides:

> "Notwithstanding the provisions of section 405(a), any petition for naturalization filed on or after September 21, 1961, shall be heard and determined in accordance with the requirements of this subchapter."

trial court held that the government should be estopped from alleging that the filing deadline in section 701 has passed or that 8 U.S.C. § 1421(e) precludes this petition, and that therefore, the petitioner should not be barred from citizenship by the late filing of this petition. We agree.

Petitioner, a native of the Philippines, enlisted in the United States Army, Philippine Scouts, in 1941. The Scouts were always a part of the Army of the United States, as contrasted with the army of the Commonwealth of the Philippines, a much larger group organized by and under the control of the Philippine Government. The Scouts were dispersed during the Japanese occupation of the islands, but when the United States Army returned, petitioner rejoined and served until his discharge on December 6, 1945. After spending some time at his mother's home in the outlying provinces, petitioner alleges that he first learned that he had missed any naturalization opportunity when he returned to Manila late in 1946 or early 1947. A letter of inquiry to the American Embassy produced a mimeographed answer informing him only that the quota on those born in the Philippines was heavily oversubscribed.

Due to the Japanese occupation of the island, naturalization under section 702 had been delayed until 1945. Following resolution of eligibility questions in early 1945, authorization was sent to an American vice-consul to commence naturalization proceedings. The Commissioner of Immigration, in a letter of September 13, 1945, indicated that this authority had

not yet been exercised. Additionally, he noted political considerations that some officials of the Philippine Government were voicing in making objections to Filipino naturalizations. He suggested to the Attorney General that the situation might best be handled by revoking the authority of the then Naturalization Examiner and "omitting to designate" any successor. The result of this of course, was to render section 702 completely ineffective. Subsequently, revocation of authority was sent, and naturalizations ceased October 27, 1945. A naturalization examiner was later sent to the Philippines, in August of 1946, about a year after the war had ended and some eight months after petitioner's discharge. This decision appears to have had some basis in the Service's conclusion that members of the Philippine Commonwealth Army were no longer eligible for naturalization under section 702. The determination did not affect the much smaller number of Philippine Scouts, and many Scouts who had re-enlisted or who were still on active duty were then naturalized.

Petitioner alleges that at no time prior to his discharge was he ever made aware of his eligibility for naturalization under section 702. The Army had a regulation requiring that notice be given aliens, at the time of their induction or enlistment, of their rights to apply for naturalization, and requiring a notation to that effect in the alien's service record. Petitioner had enlisted before this regulation took effect; it is not clear whether this notice was required to have been given when he rejoined the Army upon

its return to the islands in 1945. It is not disputed that at no time were notices posted on his unit's bulletin board, application forms distributed, announcements made to his unit, nor were any notations made in his service record to indicate that petitioner had been told about the law.[3]

Section 705 was not discretionary but imposed a legal duty upon the Commissioner of Immigration to make the benefits of sections 701 and 702 available to all qualified applicants. The duty to this petitioner was to make a representative available to naturalize non-citizen applicants while they were still serving in the armed forces. As the district court found, by revoking the authority of the only representative who could have naturalized the petitioner while he was still in the army, the Service failed in its duty to carry into effect the purposes of section 702, and thus denied petitioner of a fair opportunity to apply for naturalization during the only time he could apply.

The government argues that a broad amount of discretion was invested in officials to effect the implementation of this Act. We have been cited to no statutory language, nor can we find any ourselves, that gave either the Attorney General or the Commissioner

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[3] The War Department issued Circular No. 382, September 21, 1944, relating to procedures for naturalization, which instructed:

> "Commanding officers of all echelons will designate an appropriate individual, properly instructed, to inform non-citizens of their right to apply for citizenship, to assist such persons who desire to make application, and to expedite by all possible means completing action on the application."

of Immigration the authority to revoke, on his own initiative, the authority of the only person designated to perform naturalizations in the Philippines. We thus reject the government's contention that an official of the executive branch could unilaterally nullify this Act of Congress.

We agree with the district court that the government should be estopped from alleging, as to this applicant, that the filing deadline set forth in section 701 has passed, or that denial of the petition is required by section 310(e) of the present Immigration and Nationality Act. The petition should be granted.

This court has not hesitated to invoke equitable relief to permit one to obtain his rights of citizenship where those rights have been denied due to erroneous action on the part of administrative officials. Thus in *Tejeda* v. *United States Immigration & Naturalization Service*, 346 F.2d 389 (9th Cir. 1965), the plaintiff contended he had been a permanent resident but was denied re-entry because of misadvice of the American Consul. The court remanded for findings as to these asserted facts saying:

> "If the properly developed factual findings reveal that petitioner made a bona fide effort to re-enter in 1947 or 1948 and failed to obtain reentry due to the misadvice of the American Consul, the respondents should be precluded from denying petitioner what was rightly his—reentry as a non-quota immigrant in 1947 or 1948 under 22 U.S.C. § 1281." *Tejeda* v. *United States Immigration & Naturalization Service*, *supra*, at 394.

See also, Hetzer v. *Immigration & Naturalization Service*, 420 F.2d 357 (9th Cir. 1970).

The record shows that procedures were set up to notify non-citizens in a position similar to that of the petitioner of their right to apply for naturalization. The record shows further that these procedures were not effectively carried out, at least for this petitioner. This lack of notification was clearly prejudicial. Even if he had been notified, however, because of the conduct of certain officials, petitioner would probably have been denied the opportunity to apply for naturalization. Because the conduct of these officials was in derogation of their duty to carry out an Act of Congress, and because petitioner has been prejudiced by this conduct, the appellant is not entitled to immunity from equitable estoppel in this case. *See Gestuvo* v. *District Director, Immigration & Naturalization Service*, 337 F. Supp. 1093 (C.D. Cal. 1971).

The judgment of the district court is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 72-1562

~~[Received Jun. 1, 1973, Office of Solicitor General]~~

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT-APPELLANT

vs.

MARCIANO HAW HIBI, PETITIONER-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

A TRUE COPY

ATTEST MAY 29, 1973

DENNIS R. MATHEWS
Clerk

By /s/ M. Turley
Deputy

[SEAL]

Filed and entered February 8, 1973

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Petition No. 180627

[Filed Nov. 5, 1971, C. C. Evensen, Clerk]

PETITION FOR NATURALIZATION OF
MARCIANO HAW HIBI

ORDER GRANTING PETITION FOR NATURALIZATION

The issue of petitioner's eligibility for naturalization concerns the timing of his petition.

Petitioner filed this petition for naturalization under sections 701 and 702 of the Nationality Act of 1940,[1] measures which offered American citizenship to aliens who served in the armed forces of the United States during World War II.

The wartime provisions, however, were limited to aliens who filed applications prior to December 31, 1946, a date long since passed when this petition was filed on September 13, 1967. Moreover, section 310(e) of the present Immigration and Nationality Act, 8 U.S.C. 1421(e) precludes the naturalization of any alien except in accordance with present law.

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[1] As added by the Act of March 27, 1942, 56 Stat. 182. The test of this Act is attached in the Appendix.

Petitioner admittedly cannot qualify under present law.[2]

Nevertheless, petitioner contends that the old wartime law remains valid as to him because the Government itself denied him a fair opportunity to apply for naturalization while he was still in the Army. That was the only time he could apply. Therefore, he continues, the Government should be estopped from objecting now that his petition is filed too late.

Petitioner, a native of the Philippines, enlisted in the United States Army, Philippine Scouts, at Manila on February 19, 1941, short months before the Japanese attack on Pearl Harbor and invasion of the Philippines. When the invasion came, he retreated with the forces of General MacArthur to the Bataan peninsula and took part in the defense of Bataan and Corregidor. He was captured by the Japanese following the siege of Corregidor and was a prisoner of war for about six months.

When the U.S. Army returned to the island of Luzon in the Philippines early in 1945, petitioner rejoined the Army and served until his discharge on December 6, 1945, nearly four months after the war had ended. Among his decorations is a Distinguished Unit Badge with two Oak Leaf Clusters.

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[2] Two provisions of present law provide for the expeditious naturalization of alien veterans. But they require either the alien's admission to the U.S. for permanent residence or his enlistment in the armed forces while in the U.S. Petitioner entered the U.S. as a temporary visitor. His enlistment was outside of the U.S. Secs. 328 and 329 of the I. & N. Act, 8 U.S.C. 1439 and 1440.

Section 701 of the Nationality Act of 1940 was a general provision intended to expedite the naturalization of alien servicemen by exempting them from some of the ordinary requirements. No specific period of residence in the United States was required. The petition could be filed in a court outside of the serviceman's residence. And the alien serviceman, unlike other applicants, was not required to speak English, pass any kind of educational test, or pay a filing fee.

The benefits of section 701 were available to aliens who had been lawfully admitted into the United States or its territories or possessions. An applicant could submit his petition even after his discharge, for section 701 applied to any alien who "has served or hereafter serves" in the armed forces. The filing deadline was December 31, 1946.

Section 702, on the other hand, was the more significant for this petitioner. Under 701, the applicant had to be in the United States to file his petition before a naturalizaiton court. But 702 recognized that many aliens would be serving overseas, unable to come before a naturalization court in the United States. Therefore, it provided for the naturalization overseas of servicemen who could meet all of the requirements of Section 701.

To achieve the objective of overseas naturalization, section 702 authorized a representative of the Immigration and Naturalization Service to confer citizenship upon aliens who "while serving" in the armed forces were beyond the jurisdiction of a naturalization court, i.e., overseas. Thus, for 702 to have any

effect at all, it was crucial for the Immigration Service representative to reach applicants in the armed forces abroad before their discharge. Once discharged, the alien would lose his eligibility.

The loss of eligibility under 702 might not have been so critical for aliens who had lived in the United States prior to their military service, for if they were returned to the United States and discharged here, they might still file for naturalization under 701 before its expiration date or under the ordinary naturalization statutes thereafter.

This was not so for Filipinos, such as petitioner, who enlisted in and were discharged in the Philippines. Although the Philippines remained an American possession until its independence on July 4, 1946, Philippine citizens were treated as aliens insofar as U.S. immigration law was concerned, following the adoption of The Philippines Independence Act in 1934. The Philippines immigration quota was a bare 50 per year until independence, and 100 thereafter. Sec. 8, Act of March 24, 1934 (48 Stat. 456). It was legally impossible for all but the small number who could squeeze in under the quota, plus others who were married to American citizens, to migrate to the United States to be naturalized. For this petitioner, then, Section 702 was his only real hope of becoming an American citizen.

I agree with petitioner's view that he did not get a fair chance to become a citizen while he was still in the army, for the Immigration and Naturalization Service was intentionally remise in its obligation to

provide the means for petitioner's naturalization at the only place, and at the only time he could be naturalized, and thereby denied to petitioner the privilege Congress explicitly designed for him and others like him.

The story of how and why this happened is contained in documents of the Service which were made a part of the record of these proceedings. Other relevant facts were stipulated to by the petitioner and the Service.

The story really begins in Washington in the early part of 1945 as the liberation of the Philippines was taking place. Officials of the Immigration and Naturalization Service were then concerned by two questions involving the eligibility for naturalization under section 702 of certain Filipinos then on active duty in the Philippines.

The first question was whether members of the Army of the Commonwealth of the Philippines qualified under section 702, for the entire Commonwealth Army had been called into and made a part of the United States Army by order of President Roosevelt on July 26, 1941. The Service concluded that such persons had served in the United States Army within the meaning of section 702 and therefore were eligible for naturalization.[3]

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[3] A distinction should be noted between the Army of the Commonwealth of the Philippines and the Philippine Scouts. The former was an army organized by and under the control of the Philippines Commonwealth Government until President Roosevelt's order. The Philippine Scouts, in which petitioner served, were always a part of the U.S. Army proper.

The second question provoked some disagreement within the Service. It was whether Filipinos who had never resided in the United States proper were eligible for the benefits of section 702. That question ultimately was resolved by the Attorney General who determined that prior residence in the Philippines, then an American possession, satisfied the statute's requirements.

Having resolved those two questions, the Service designated a George H. Ennis, an American vice-consul in Manila, to naturalize aliens who were eligible under 702. Almost immediately thereafter, however, the Service had some second thoughts about the naturalization of Filipinos in the Philippines. For it appears that officials of the Philippine Commonwealth government had expressed their concern about the possibility of large numbers of Filipinos, perhaps as many as 250,000 being naturalized and departing for the United States just as the Philippines was to become independent.

The response of the Commissioner of Immigration was to recommend revocation of the authority of Mr. Ennis, the designated naturalization examiner. Since these servicemen could be naturalized only in the Philippines, and only by a Service designated representative, they would have no way of becoming American citizens and could not leave the Philippines.

On September 13, 1945, the Commissioner wrote the Attorney General:

> "The Philippine Government again has expressed to the Department of State its concern because

Filipino members of the armed forces of the United States are being naturalized even though they have always been domiciled in the Philippine Islands. Since the Islands are not embraced within the domain of any naturalization court, naturalization therein may be awarded only by an administrative official designated by me under the authorization of Section 702 of the Nationality Act, 8 U.S.C. 1002. Mr. George H. Ennis, Vice-Consul of the United States at Manila, has been designated to grant naturalizations under Section 702, but I do not believe he has as yet exercised his authority. In view of the concern expressed by the Philippine Government, it is my belief that the situation might best be handled by revoking the authority previously granted to Mr. Ennis and by omitting to designate any representative authorized to confer citizenship in the Philippine Islands. This course would eliminate a source of possible embarrassment in our dealings with the Philippine people, who probably will be awarded independence in the near future."

The Commissioner's recommendation was approved by the Attorney General on September 26, 1945 and the authority of Mr. Ennis to naturalize alien servicemen immediately revoked.[4]

Another naturalization examiner, a P. J. Phillips, was not sent to the Philippines until August, 1946, about a year after the war had ended and some eight

[4] Apparently the notice did not reach Mr. Ennis until the end of October, 1945, for he did naturalize some aliens as late as October 26, 1945.

months after petitioner's discharge. Although it is not completely clear from the record, it appears as though the Service decision to send a representative to the Philippines at that time was governed by the Service's new conclusion, based upon subsequent legislation, that members of the Philippine Commonwealth Army were no longer eligible for naturalization under section 702. This determination did not affect the much smaller number of Philippine Scouts, and so Mr. Phillips did naturalize many Scouts who had had the good fortune to reenlist and so were still on active duty when Mr. Phillips finally arrived.

Of course, this was of no comfort to petitioner who had been discharged on December 6, 1945, about eight months earlier. It is petitioner's contention that he was not advised of his right to apply for naturalization while he was still in the army, that he would have applied had he known about it and were the means available for him to apply. I find that this is so. But even if petitioner had known about the benefits of section 702 before his discharge, it would have been legally impossible for him to become naturalized after the revocation of the authority of the first representative, Mr. Ennis. All of this truly deprived petitioner of a fair opportunity to be naturalized and could hardly be what Congress had in mind when it decided to offer citizenship to aliens who had served in our armed forces during the war, particularly to those like petitioner who endured some of the most hazardous moments of that war. It is indeed

difficult to imagine a more obvious frustration of a legislative purpose.

It is said that the equitable principle of estoppel should not be lightly applied to the Government. Nevertheless, it is well established that it may be invoked even against the Government, given the appropriate circumstances and necessity to correct a manifest injustice. *U.S.* v. *Fox Lake State Bank*, 366 F. 2d 962 (7th Cir. 1966).

Indeed, the principle of estoppel has been invoked as against the Immigration Service by this Court and higher Courts on more than one occasion in recent years. The first such instance is *Petition of Macachor*, No. 158858, D.C.N.D. Cal, Sept. 30, 1966, unreported. Like this petitioner, Macachor was a veteran of the Philippine Scouts who had tried unsuccessfully in the Philippines to become an American citizen on the basis of his army service. He had written a letter to the Immigration Service in the United States from the Philippines in 1958, asking how he might become a citizen. He had the good fortune, however, to save the Service's reply, for the Service erroneously advised him that he would have to enter the United States as an immigrant before he could qualify.

This advice was erroneous because Macachor had a total of more than five years of military service and thus was eligible for naturalization under the combined provisions of section 324 of the Nationality Act of 1940, the Act of August 16, 1940, and the savings clause found in section 405 of the present Immigra-

tion and Nationality Act.[5] To qualify for naturalization under those provisions, he did not require entry as an immgrant but could have qualified merely by coming here as a vistor. This Court so ruled in another case, *In re: Roble*, 207 F. Supp. 384 (N.D. Cal. 1962).

Relying on the advice of the Immigration Service, however, Macachor sought to obtain a visa to come here as an immigrant. He was turned down because a visa was not available to him under the Philippines immigration quota.

When Macachor finally did get here as a visitor in 1963 and sought naturalization upon the same rationale as was applied in *Roble*, the Government argued it was too late to apply the old laws that had conferred citizenship upon Roble. For in the interim, section 310(e) of the Immigration and Nationality Act became law and prohibited the naturalization of anyone under any old law.

Nevertheless, this Court found that section 310(e) could not be applied to Macachor. The Government simply was estopped from doing so, this Court held, because the Government's erroneous advice had prevented Macachor from coming to the United States before 310(e) was enacted, and when he could have qualified for naturalization.

Two other cases applying the principle of estoppel against the Government are *Tejeda* v. *Immigration*

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[5] This petitioner does not quite have five years of service and so apparently could not qualify upon the same basis as Macachor.

and Naturalization Service, 346 F. 2d 389 (9th Cir. 1965), and *Hetzer* v. *Immigration and Naturalization Service*, 420 F. 2d 357 (9th Cir. 1970).

In *Tejeda* v. *I. & N.S.*, the Immigration Service sought Tejeda's deportation as a visitor who had stayed longer than allowed. The issue, however, involved Tejeda's contention that he was entitled to resident status here because of his efforts years earlier to enter the United States.

Tejeda had been a permanent resident at one time and claimed that he was denied a visa with which to re-enter the United States when he applied for such a visa at the American Embassy in Manila. At that time he was eligible for admission to the United States under a special law involving Philippine nationals who had been former residents of this country.

The Court remanded the case for further finding of fact, holding that if Tejeda could establish his claim of being erroneously denied a visa, he would be entitled to resume his status as a lawful resident of the United States. The Government under such circumstances would be estopped to argue that the special law which authorized Tejeda's admission years earlier had long since expired.

The case of *Hetzer v. I. & N.S.*, supra, involved an alien whose application for resident status had been denied on the ground that he had not complied with the foreign residence requirement for former exchange visitors. An exchange visitor, with exceptions not pertinent in this case, is barred from resident status unless he returns to his country for two years after completing his exchange visit here.

However, Hetzer contended that he should not be held to such foreign residence requirement because he was misled into becoming an exchange visitor by an Immigration Service official. Once again, the Court remanded the proceedings for further hearing, holding that if Hetzer could prove his allegations, the Government would be estopped to argue that he was subject to the exchange visitor restrictions.

There is no valid distinction between the case of one person who relies to his detriment on the Government's erroneous advice, as happened in the cited cases, and that of another who is denied his right to apply for citizenship by the Government's deliberate failure to provide the means for him to exercise that right, as happened to this petitioner. The injustice is equally apparent in both instances.

It is difficult to conceive of an injustice that would be more obvious than denial now of this petitioner's long overdue claim to American citizenship. It is within the equitable powers of the Court to prevent that injustice. The Government, therefore, is estopped from objecting that this petition is not timely filed and is estopped from invoking the provisions of section 310(e) of the Immigration and Nationality Act. The petition will be granted.

Dated: Nov. 4, 1971

/s/ Lloyd H. Burke
LLOYD H. BURKE
United States District Judge
Copies mailed to parties of
Record

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Petition No. 180627

[Filed Nov. 5, 1971]

PETITION FOR NATURALIZATION OF
MARCIANO HAW HIBI

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for hearing on October 22, 1971, before this Court. Phelan, Simmons and Ungar, by Donald L. Ungar, appeared as counsel for petitioner. Marilyn Patel, Designated Naturalization Examiner, appeared on behalf of the Immigration and Naturalization Service.

The Court, having examined the proofs offered by petitioner and the Designated Naturalization Examiner, hereby makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Petitioner, a native of the Philippines, came to the United States for the first and only time on April 25, 1964, when he was admitted as a temporary business visitor. He filed this petition for naturalization on September 13, 1967, claiming eligibility for citizenship under sections 701 and 702 of the Nationality Act of 1940.

2. Petitioner enlisted in the Philippine Scouts, a part of the United States Army, on February 19, 1941 at Manila, and was discharged there on December 6, 1945.

3. At no time while on active duty was petitioner advised of his right to apply for naturalization pursuant to sections 701 and 702 of the Nationality Act of 1940.

4. Had petitioner been so advised while on active duty, he would have filed the necessary petition.

5. Although the Immigration and Naturalization Service authorized George H. Ennis to naturalize alien servicemen in the Philippines in August 1945, pursuant to section 702 of the said Act, his authority was withdrawn in October 1945 and he naturalized no aliens after October 27, 1945.

6. The Service did not send another representative to the Philippines for the same purpose until August 1946.

Conclusions of Law

1. The purpose of section 702 was to provide for the naturalization overseas of aliens unable to come to the United States during World War II.

2. The benefits of section 702 were available only to aliens as long as they remained on active duty.

3. The Immigration and Naturalization Service was charged with a legal duty to carry into effect the said purpose of section 702. Toward that end, the Service was authorized to send a representative overseas to naturalize alien applicants.

4. The duty imposed upon the Immigration and Naturalization Service was to make such representatives available to alien applicants while such applicants were still serving in the armed forces. Otherwise, the purpose of section 702 would be frustrated.

5. By revoking the authority of the only representative who could have naturalized petitioner while he was still in the army, the Service failed in its duty to carry into effect the purposes of section 702. The Service's failure deprived petitioner of a fair opportunity to apply for naturalization during the only period of time in which he could apply.

6. Denial of this petition under such circumstances would be a manifestly unjust result. This Court has the equitable power to prevent it. The Government, therefore, is estopped from alleging that the filing deadline specified in section 701 has passed, or that denial of the petition is required by section 310(e) of the Immigration and Nationality Act. The petition will be granted.

Dated: Nov. 4, 1971

/s/ Lloyd H. Burke
LLOYD H. BURKE
United States District Judge

APPENDIX D

IN THE
DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION, AT SAN FRANCISCO, CALIFORNIA

Petition No. 180627

PETITION FOR NATURALIZATION OF
MARCIANO HAW HIBI

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION OF THE DESIGNATED NATURALIZATION EXAMINER

TO THE HONORABLE, THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION:

1. The undersigned, duly designated under the Immigration and Nationality Act to conduct preliminary examinations upon petitions for naturalization, respectfully submits that the above-named petitioner, a 53-year-old male, native of the Philippines, first entered the United States on April 25, 1964, as a business visitor for a period to expire June 30, 1964. Petitioner filed this petition for naturalization on September 13, 1967, pursuant to the provisions of section 329 of the Immigration and Nationality Act, 8 U.S.C. 1440.

The Issues Presented Here Are: (a) Whether the Petitioner Has Established that He Is Eligible for Naturalization Under Section 329 of the Immigration and Nationality Act, Supra, by Reason of His Military Service;

And (b) Whether the Petitioner Has Established that He Is Eligible for Naturalization Under Any Other Applicable Provisions of the Law Relating to Naturalization by Reason of Said Military Service.

2. STATEMENT OF FACTS

The petitioner herein was born on November 2, 1917 in Manila, Philippines. He first entered the United States on April 25, 1964, as a business visitor for a period to expire June 30, 1964. In his petition for naturalization filed on September 13, 1967, pursuant to Section 329 of the Immigration and Nationality Act, supra, (Exhibit 1-A) he alleged military service in the Philippine Scouts and the United States Army from February, 1941 to April, 1945 and April, 1945 to December, 1945, having been discharged therefrom in December, 1945. Petitioner enlisted in the Philippine Scouts in Pampanga, Philippines. All of his service with the Scouts and the United States Army was in the Philippines. He never enlisted or reenlisted in the United States.

In further preliminary examinations before a designated naturalization examiner of this Service on February 12, 1968, and August 28, 1968, (Exhibit 1), petitioner elaborated on his military service, testifying that he enlisted in the Philippine Scouts on

February 17, 1941 and served in active duty until December 6, 1945. During this time he was a prisoner of war, having been captured in the defense of Corregidor in 1942 and released by the Japanese after six months' internment. Upon his release in 1942 he testified he went home to Manila and then to Pangasinan. He resumed full-time active military duty in April, 1945, joining the Fifth Military Police Battalion in Pampanga. From April, 1945 to his discharge in December, 1945 he was stationed in Pasay and finally at Marikina, twenty miles from Manila, where he was released. Upon his discharge, Mr. Hibi testified that he went to his mother's hometown of Caseguran, Bicol. He states in his further preliminary examination on February 12, 1968, and again in his affidavit of February 27, 1967 (Exhibit 1-F), that he returned to Manila in July, 1946 and learned about the opportunity for naturalization. At this point there is some disparity in petitioner's testimony. He alleges he went to the Fifth Military Police Camp at that time inquiring about naturalization and was advised that "Judge Phillips," the naturalization officer had already gone and would not return; that he then wrote a letter to the American Consul in Manila inquiring about naturalization and going to the United States and was advised of the immigration quotas and their oversubscription. Neither this letter nor the response has been submitted in evidence by the petitioner. However, on August 28, 1968, when he appeared before this Service he testified that he left the military in 1945, went to

his brother's home in Manila for one or two months and then to his mother's home in Bicol Province. He further testified he was not certain when he returned to Manila and made inquiry at the American Embassy about naturalization, indicating that it may have been in 1946 or early 1947. He does not recall whether or not he had visited his old military outfit. Some of the information he received about naturalization was from his former fellow servicemen.

Petitioner made no further inquiries after this last alleged response which was in 1946 or 1947, as can best be estimated from his testimony. He has submitted no other evidence of communication with the Immigration and Naturalization Service, the State Department, the War Department, or any other government agency about his eligibility for naturalization, but relied solely on his testimony about acts and conversations that occurred over twenty years ago.

Petitioner's military service record has been verified by this Service (See Exhibit 1-J and 1-G). He entered active duty service on February 19, 1941 and was honorably discharged on April 6, 1945, reenlisting on April 7, 1945, and finally being honorably discharged on December 6, 1945.

He filed this petition under Section 329 of the Immigration and Nationality Act, 8 U.S.C. 1440. Other sections subsequently alleged as a basis for petitioner's naturalization are Sections 701 and 702 of the Act of March 27, 1942 (66 Stat. 182, 187) and Section 324(a) of the Nationality Act of 1940. Under

Section 702 and the enacting provision of Section 705, overseas naturalization of members of the armed forces was made possible. In pursuance thereof, officers of the Immigration and Naturalization Service were sent to overseas military posts to effect the naturalization of eligible members of the United States Armed Forces. Naturalization proceedings were conducted by Service officers traveling from post to post from 1943 to 1946 in such places as England, Iceland, Egypt, Iran (then Persia), North Africa, Islands of the Pacific, including the Philippines, to mention a few. During this time over 5,000 nationals of the British Empire were naturalized overseas, several thousand Germans, Italians and Mexicans, and about 5,000 Filipinos. While some Filipinos were naturalized in other theaters of the war, most of them were naturalized in the Philippines from August, 1946 to October, 1946 when P. J. Phillips, an examiner of this Service, conducted hearings in Manila and other places on the Island of Iason and Base II, a military post 200 miles from Manila.

Prior to dispatching personnel overseas to accomplish as many naturalizations as possible, written information bulletins and instructions were provided all Immigration and Naturalization Service and appropriate military personnel. ". . . (F)or the purpose of apprising members of the Immigration and Naturalization Service and officers of the military and naval forces of the United States, of the conditions under which naturalization may be conferred upon noncitizens who are serving honorably in such forces,

but who are outside the jurisdiction of any naturalization courts . . . .", Inst. No. 63 and No. 64 were issued on May 4, 1942. (Exhibit 1-I, p. 16-18). Info. Bulletin No. 29, dated April 2, 1942, advising of the new provisions, was also issued. (See Exhibit 1-I, p. 6).

The War Department issued Circular No. 382, of September 21, 1944, relating to procedures for naturalization. These instructions advised: "Commanding officers of all echelons will designate an appropriate individual, properly instructed, to inform noncitizens of their right to apply for citizenship, to assist such persons who desire to make application, and to expedite by all possible means completing action on the application." The circular explained the manner in which applicants were to be naturalized and that proceedings were to be held at places convenient to the post, camp or station of the applicant.

Under the provisions of Section 701 and 702, supra, each applicant was to present "two credible witnesses, citizens of the United States" to testify to their personal knowledge of applicant's good moral character, loyalty and attachment. The service of each petitioner was to be certified to by at least two citizens, members of the military or naval forces, or by a duly authenticated copy of his service record. In accordance with these provisions the instructions of the Immigration and Naturalization Service through its representatives are to the effect that "noncitizen applicants for naturalization in the Army of the United

States will not be favorably considered in the absence of a certificate of approval of the applicant's commanding officer." (Exhibit 1-I, p. 24).

In summarizing his naturalization tour of the Philippines, Mr. Phillips said, "I am sure, too, that the opportunity for naturalization was brought to the attention of everyone who wanted that privilege." (Exhibit 1-L, p. 122).

3. Discussion and Authorities

Section 329 of the Immigration and Nationality Act (8 U.S.C. 1440) provides for naturalization of one who has honorably served in the military during the period September 1, 1939 to December 31, 1946, provided he shall have enlisted or been inducted in the United States, Canal Zone, American Samoa or Spain's Island or at any time subsequent to enlistment or induction was lawfully admitted to the United States for permanent residence.

"Lawfully admitted for permanent residence" is defined as "having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws. . . ." (Section 101(a)(20) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(20).

The same section, subparagraph (38) defines the "United States" as "the continental United States, Alaska, Hawaii, Puerto Rico, Guam and the Virgin Islands of the United States."

Petitioner herein was admitted as a temporary visitor for business (Class B-1) pursuant to Section

101(a)(15)(B) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(B), (Exhibit 1-C). Such an admission is not for the privilege of residing permanently in the United States and is not an admission within the meaning of Section 329, supra, for the purpose of naturalization. (*In re Carbezon*, 210 F.Supp. 919 (S.D.N.Y. 1962); *Petition of Hai Guan Han*, 178 F.Supp. 199 (S.D.N.Y. 1959)).

Nor was petitioner enlisted or inducted in a qualifying area, the Philippine Islands having been determined not to be within this area for the purpose of Section 329, supra, *Petition of Mata*, 196 F. Supp. 523 (N.D. Cal. 1961).

Petitioner argues eligibility for naturalization under Section 701 and 702 of the Act of October 14, 1940, as amended. (See Appendix p. 1). Under Sections 701 and 702, as set forth above, petitioner may have been eligible for naturalization during his service in World War II. These provisions allow for the naturalization of a noncitizen member of the United States military or naval forces if he served in an honorable status and who was at the time of his enlistment or induction a resident of the United States if he,

> "(a) was lawfully admitted into the United States, including Territory and Possession, or (b) having entered the United States, including its Territory and Possession, prior to September 1, 1948, being unable to establish lawful admission to the United States. . . ."

As a result of such service the petitioner was not only exempt from naturalization requirements of residence and lawful admission, but also "while serving honorably" could be naturalized outside the jurisdiction of the United States.

The question with regard to this argument is twofold. First of all, whether petitioner was eligible under Sections 701 and 702, and, secondly, what is the present effect of those sections on this petition, said sections having been terminated by operation of law on December 31, 1946.

Petitioner was born and resided in the Philippines and entered the military service in the Philippines at a time when that country was a possession of the United States. He served honorably in the Philippine Scouts from February 19, 1941 to December 6, 1945, when he received an honorable discharge. Such service is considered to be service in the United States Armed Forces for the purpose of naturalization. (*In re Naturalization of Garcon* (*Ramos*), 192 F.Supp. 439 (N.D. Cal. 1961); cf. *Petition of Roble*, 207 F.Supp. 384 (N.D. Cal. 1962); *Migael* v. *McCarl*, 291 U.S. 442 (1934), at p. 452-453).

Petitioner has the qualifying service to be eligible for naturalization under Sections 701 and 702, supra. In order for him to be naturalized under those provisions he would have had to present himself and at least two credible United States citizen witnesses who could state that they personally knew the petitioner and could testify to his good moral character, loyalty and attachment, and affidavits of at least two citizens,

members of the United States Armed Forces who are authorized to certify to petitioner's military service.

What is the effect of petitioner's failure to file his petition prior to the statutory termination date of December 31, 1947? Petitioner here is claiming his eligibility to naturalization under Section 701 and 702. Section 701 from the time of its enactment contained a termination date by which time a petition made under its provisions must be filed. Upon its first enactment by the Act of March 27, 1942 (56 Stat. 182, 187) Congress provided that "the petition shall be filed not later than one year after the termination of the effective period of those titles of the Second War Powers Act, 1942, for which the effective period is specified in the last title thereof." It was thereafter extended to December 31, 1945 by operation of the Act of December 20, 1944 (58 Stat. 827) and finally extended to December 31, 1946 by the Act of December 28, 1945 (59 Stat. 658).

In addition, while naturalization could be obtained by filing a petition in any court authorized to naturalize aliens before December 31, 1946, another termination date was imposed on aliens seeking the benefits of Section 702, overseas naturalization. Congress provided that a person entitled to naturalization by reason of his military service may be naturalized without appearing before a naturalization court "while serving honorably in the military or naval forces of the United States." By the use of these words, it is clear that Congress intended to limit overseas naturalization to those who were still in

military service and not extend it to those who had already been discharged. It has long been recognized that Congress may make any laws that it sees fit pertaining to naturalization so long as these laws are uniform. Such conditions and limitations on the rights to naturalization are the prerogative of Congress and require strict compliance. (*U.S.* v. *Ginsberg*, 243 U.S. 472 (1917); *U.S.* v. *Macintosh*, 283 U.S. 605 (1931); *U.S.* v. *Bregler*, 55 F.Supp. 837 (D.C. N.Y. 1944); *In re Ringnalda*, 48 F.Supp. 975 (S.D. Cal. 1943); *In re Weitzman*, 284 F.Supp. 514 (D.C. Minn. 1963)).

Congress placed a limitation on when the petitions, based on the qualifying service, could be filed and when naturalization could be obtained without appearance before a naturalization court. In so doing it acted within its constitutional powers. The conditions specified were uniform ones. They applied to all members of the United States Armed Forces. As a result of the legislation permitting overseas naturalization over 21,000 aliens were admitted to citizenship by naturalization outside the United States. Under Sections 701 and 702, based on military service, petitioner would have had to file his petition for naturalization by December 31, 1946, or, while outside the United States, by December 6, 1945, the last date of his service. Having failed to do so he was and is no longer eligible for naturalization under those provisions.

Nor may petitioner use the benefits of those provisions under the present law. Section 310(e) spe-

cifically restricts the eligibility to naturalization to the present statute. That section states:

> "Notwithstanding the provisions of Section 405 (a), any petition for naturalization filed on or after the enactment of this subsection shall be heard and determined in accordance with the requirement of this title."

The following is quoted from the Legislative History of the Amendment, 91 U.S. Code Congr. and Adm. News, pp. 2981 and 2982:

> "Section 17 amends Section 310 of the Immigration and Nationality Act so as to require all petitions for naturalization filed after the enactment of this section to be heard and determined in accordance with the requirements of that Act.
>
> "The purpose of this amendment is to overcome interpretations placed upon the savings clause (Section 405) of the Immigration and Nationality Act (*United States* v. *Menasche*, 75 S. Ct. 513, 348 U.S. 528 (1955); *United States* v. *Wolff*, 270 F.2d 422, 3 Cir., Cert. Den. 362 U.S. 918 (1960); *McColion* v. *United States*, 279 F. 2d 162, 2 Cir. (1960)), holding in effect, that residence in the United States before December 24, 1952, was sufficient to confer naturalization rights under the Nationality Act of 1940, as amended, notwithstanding its repeal on that date by the Immigration and Nationality Act. As a consequence, petitioners of this class are being considered eligible, nine years after its repeal, for naturalization under the 1940 law, and, if more favorable to the circumstances in their cases, they may elect to claim the benefits of the

> Immigration and Nationality Act. This, notwithstanding the fact that the petition for naturalization was not filed until December 24, 1952, when the Immigration and Nationality Act became effective.
>
> "In the opinion of the Committee, such interpretations are contrary to the intent of Congress clearly indicated in the basic Immigration and Nationality Act. The administration of two nationality laws simultaneously is cumbersome, inefficient, and unfair to other applicants for naturalization. In accordance with the original purpose of the Immigration and Nationality Act, this clarifying amendment will make it amply apparent that from and after its enactment requirements of the provisions of the Immigration and Nationality Act will be uniform and will apply to all petitioners for naturalization."

In addition, Congress has made it clear that this provision "is designed to correct certain interpretations that have been made in the administration of the Nationality provisions of the Immigration and Nationality Act under the savings clause of that Act." (Cong. Rec. Vol. 107, Part 15, p. 19654, 87th Cong., 1st Session, September 14, 1961-September 21, 1961).

The "interpretations" under the savings clause referred to by Congress are to be found in such cases as *In re Roble*, supra, wherein it was held that a petitioner who had sufficient military service to qualify under the Nationality Act of 1940 before its repeal and who could have applied for naturalization under that Act had he entered the United States

prior to its repeal, was entitled to a continuance of that right under the savings clause, and was, therefore, admitted to citizenship.

Congressional intent is clear. It wished to forestall the burden of administering two nationality laws and to set up a single standard for naturalization. It was expressly aimed at decisions such as *Roble* which would allow the petitioner to claim benefits under former Acts if they were more advantageous than the provisions of the current Act. Section 310(e), supra, clearly restricts the filing of petitions to the provisions of the present statute. This Court recognized that intention when it denied the *Petition of Indialao Rivas Carrido*, Petition No. 184114, unreported, July 29, 1970. As reasoned above, petitioner is not eligible under any provision of the present statute.

The savings clause, relied upon by the Court in *Roble*, does not benefit the petitioner here. The rights to naturalization claimed by this petitioner were terminated by operation of law on December 31, 1946, and were not in existence at the time of the 1952 enactment with its savings clause. Certainly it cannot be reasoned that the savings clause can save that which was not in existence at the time of its enactment. Also, for the reasons set forth above, petitioner cannot claim as did *Roble* the benefits of Section 324 of the Nationality Act of 1940 since the enactment of Section 310(e), supra, has cut off the right to file under any Act other than the present one.

Petitioner is not eligible for naturalization under any provision of the present statute and no right to naturalization is preserved to him under any of its provisions.

Petitioner claimed at the time of the further preliminary examination on this petition that he was not advised of or was misadvised about his eligibility for naturalization at the time of his military service and thereafter; that the Government had a duty to so advise him; that as a result thereof, petitioner was not given the opportunity to file his petition and that the Service is now estopped from claiming petitioner is no longer eligible because of his failure to timely file. Sections 702 and 705, supra, provide for the promulgation of the Act and dispatching naturalization officers to perform naturalization overseas. The duty was placed upon the Commissioner of the Immigration and Naturalization Service to carry out the purpose of the Act. To this end procedures were established, members of the Immigration and Naturalization Service and officers of military and naval forces were advised and representatives were sent to the various war theaters. From the passage of the Second War Powers Act in 1942 until June 30, 1946 over 70 representatives had been designated to grant naturalization outside of the United States. (See Exhibit 1-I, Annual Report for Fiscal Year end of June 30, 1946). Other officers were designated during the aftermath of the war. Instructions were circulated by the United States Department of Justice and the War Department to ensure that all non-

itizens would be advised of their right to naturalization. Forms entitled "Notice to Aliens Found Acceptable for Military Service" were prepared by the War Department wherein the alien was advised that such a procedure was available for naturalization based on honorable military and naval service.

Certainly in war time it is conceivable that not every eligible alien would be advised of his right to naturalization. This would be practically impossible particularly in countries such as the Philippines which for a large part of the war was occupied by enemy forces and where the military units, such as the Philippine Scouts were organized as guerilla outfits. It is clear from the evidence contained in Exhibits 1-I to 1-M that the Service and the War Department made every effort to advise as many aliens as possible of their rights to naturalization. To place a greater duty on the government agencies would be harsh and impossible to discharge. In this case the serviceman had already been released and was living with, first his brother, and then his mother in a province far from any military duty post. There is no indication the War Department or U.S. Army officers knew petitioner's whereabouts after discharge or that petitioner had advised them of his location. They could not be expected to search out every hamlet and village to locate discharged service personnel and advise them they could be naturalized. It is apparent from Exhibits 1-I to 1-M that it was the practice to advise servicemen of naturalization provisions upon their induction or first contact with an Army post.

It was not possible to arrange naturalization of alien servicemen in the Philippines until after enemy occupation ceased in 1945. Thereafter, arrangements were made for "Judge Phillips", the naturalization examiner referred to hereinabove, to perform naturalization ceremonies in the Philippines and, through his efforts, over 4,000 Filipinos were naturalized.

There is a strong presumption that the Government and its agencies properly and duly carried out their duties as required by the law. (*Laughlin* v. *Cummings*, 105 F.2d 71 (D.C. Cir. 1939); *Chin Chuck Ming* v. *Dulles*, 225 F.2d 849 (9th Cir. 1955); *Holman* v. *U.S.*, 383 F.2d 411 (Ct. Cl. 1967); *Greenway* v. *U.S.*, 175 Ct. Cl. 350 (1966), cert. den. 385 U.S. 881; reh. den. 385 U.S. 954 (1966)). That presumption applied to the duties assigned by Section 705, supra, and the evidence clearly establishes the Commissioner, with the cooperation of the War Department, carried out these duties.

The argument propounded by the petitioner that the Government, having failed to advise this alien of the right to naturalization, is now "estopped" from claiming his ineligibility, is without merit. It has already been shown that the Government had discharged its duties in advising alien servicemen. In addition, the courts have frequently held that the doctrine of estoppel must be applied with great caution to the Government and its officials. *U.S.* v. *Fox Lake States Bank*, 366 F.2d 962 (7th Cir. 1966). (See also: *U.S.* v. *Horton*, 77 F.2d 731 (5th Cir. 1935); *Wisconsin Railway Company* v. *U.S.* 164 U.S.

190, 210 (1896); *McDonald* v. *U.S.* 89 F.2d 128 (8th Cir. 1937)). The courts have been reluctant to apply estoppel or find estoppel against this Service in deportation, immigration or other cases of naturalization proceedings. (See: *Lang* v. *District Director of U.S. Immigration and Naturalization Service*, 298 F.Supp. 413 (C.D. Cal. 1969); *Manguarra* v. *Immigration and Naturalization Service*, 390 F.2d 358 (9th Cir. 1968); *Malatjis* v. *Rosenberg*, 305 F.2d 249 (9th Cir. 1962)). Further, estoppel would generally not be permitted where its application would defeat the administration of the law or frustrate statutory purpose, or where strict construction of the statute in question will avoid a finding of estoppel. *Sanitary District* v. *U.S.* 266 U.S. 405 (1925); *American Surety Co.* v. *U.S.*, 112 F.2d 903 (10th Cir. 1940); *Federal Land Bank* v. *Mulhorn*, 180 La. 627, 157 So. 370, 95 ALR 948 (1934); *Federal Land Bank* v. *Saith*, 265 N.C. 18, 143 S.E. 2d 300 (1965).

Congress by the enactment of Section 310(e), as argued above, has made obvious its intention that the Service administer only one law of naturalization. To allow petitioner to assert estoppel against this Service would defeat that very purpose.

Indeed, if the theory of estoppel were held to operate against the Service, the petitioner, who bears the burden of establishing his eligibility to naturalization, cannot sit idly by and gain the benefits that may be brought by delay. Laches has always been considered a bar to an equitable remedy such as estoppel where the party claiming estoppel has de-

layed in asserting his rights. (*Arnold Bernstein Shipping Co.* v. *Tidewater Commercial Co.*, 84 F. Supp. 946 (D.Md. 1949); *Petition of American Locomotive Co.*, 87 F.Supp. 754 (H.D. Mich. 1949), aff'd. 183 F.2d 316 (6th Cir. 1950); *Caribe Luziber and Trading Corp.* v. *Thrawillinger*, 268 F.Supp. 532 (D. St.Croix 1967)). Petitioner had stated that he first learned that alien servicemen were being naturalized in 1946. Yet there is no record that he ever made any application, wrote a letter of inquiry or in any way persisted in his interest to obtain naturalization. He had testified that he wrote a letter to the American Consul in Manila about coming to the United States and received a letter about immigration laws and quotas. He has not produced a copy of this letter or the Consul's reply. His testimony as to when and how he first learned about naturalization opportunities is at best conflicting. On February 27, 1967, he swore in an affidavit that he first learned about the opportunity in July, 1946 from former members of the Armed Forces who had already been naturalized. In another affidavit taken on August 28, 1968, he states he is not certain of the date when he first heard about naturalization.

Over 20 years later he appears before this Service for the first time, claiming his right to naturalization. After 20 years, his recollection of events is hazy and unsubstantiated. Service personnel with first hand knowledge of what occurred at that time are no longer available and many Service records have been destroyed.

While petitioner's military service is commendable and heroic, he is not eligible for naturalization based on that service without an admission for lawful permanent residency. To admit petitioner based on his claim to eligibility under Section 701 and 702, supra, would open the flood gate to numerous unfounded claims to the right of naturalization of others similarly situated, without any evidence that while the opportunity was available for their naturalization in 1946, they desired to or made any effort to take advantage of it. Certainly, it cannot be said that every alien serviceman who had the opportunity to or was eligible to become a United States citizen did so or desired to. Congress provided the opportunity and a date after which it could no longer be exercised. That opportunity was intended to be extended during war time only and not to continue until such time as the alien decided appropriate to exercise it.

If this statute can be extended to those who claim they were never advised, what is to prevent extending benefits of other statutes long since repealed to those who would gain benefits under them? It is clear that Congress intended by enacting Section 310(e), supra, to prevent just this kind of occurrence under burden of administering several nationality laws. A petitioner for naturalization has the burden of proving eligibility for American citizenship. The nature of this burden was set forth by the Supreme Court in *Berenyi* v. *District Director, Immigration and Naturalization Service,* 385 U.S. 630 (1967):

"He is the moving party, affirmatively asking the Government to endow him with all the advantages of citizenship. Because that status, once granted cannot lightly be taken away, the Government has a strong and legitimate interest in ensuring that only qualified persons are granted citizenship. For these reasons, it has been universally accepted that the burden is on the alien applicant to show his eligibility for citizenship in every respect (emphasis supplied). This court has often stated that doubts 'should be resolved in favor of the United States and against the claimant.' *E.g., U.S.* v. *Macintosh*, 283 U.S. 605, 626." (87 S. Ct. 666, 671).

In addition, a person asserting that the Government or one of its agencies has not complied with its official duties or asserting the doctrine of estoppel bears the burden of overcoming that presumption and proving estoppel by clear and satisfactory evidence, "certain in every particular with nothing left to move intendment or inference." 23 Am. Jur. 2d, Section 148, p. 827.

Petitioner has not established by any evidence other than his own conflicting testimony that the Government failed to carry out its assigned duties of advising him of his right to naturalization or that grounds for estoppel against the Service exist. Nor has he met the burden of establishing that he is eligible for naturalization under the provisions of this statute or any other statute.

4. Pursuant to the provisions of Section 335 of the Immigration and Nationality Act (8 U.S.C. 1446), I hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACT

I

That the petitioner first entered the United States as a business visitor on April 25, 1964, for a period to expire June 30, 1964, and that he has never been admitted to the United States for lawful permanent residence;

II

That the petitioner served in the Philippine Scouts in the United States Army in the Philippines from February 17, 1941 until December 6, 1945, that all of his service was in the Philippines and that he never enlisted, reenlisted or extended an enlistment in the United States;

III

That the petitioner filed this petition for naturalization on September 13, 1967;

IV

That petitioner has alleged he was never advised of his right or eligibility to naturalization during or after his service in the Philippines during a time when naturalization of alien servicemen was performed overseas;

V

That the pettioner has presented no evidence of communication with any government agency re-

garding his eligibility to naturalization even though he was aware from at least 1946 that other alien servicemen had been naturalized.

CONCLUSIONS OF LAW

I

That the petitioner has not established that he is eligible for naturalization under the provisions of Section 329 of the Immigration and Nationality Act or under any other provisions of law argued by him;

II

That petitioner has not established that he is eligible for naturalization under Sections 701 and 702 of the Act of October 14, 1940, as amended, or that he was entitled to naturalization overseas under Section 702;

III

That petitioner has not established that he is eligible for naturalization under any provision of the Nationality Act of 1940;

IV

That petitioner has failed to establish that the Government did not perform any duty or obligation toward him with regard to advising him of his eligibility to naturalization;

V

That the doctrine of estoppel against the Government as urged by the petitioner must be applied with great caution and proved in every particular and the petitioner has failed to establish that the Government should be estopped from denying his petition for naturalization;

VI

That the petitioner has failed to establish that by reason of his military service he is eligible for naturalization under any provisions of the law.

5. I recommend, therefore, that this petition for naturalization be DENIED as set forth hereinabove on the ground that the petitioner is not eligible for naturalization under Section 329 of the Immigration and Nationality Act (8 U.S.C. 1440) or under any other provision of any former nationality statute.

Respectfully submitted,

/s/ ~~[Illegible]~~ Marilyn Pete
Designated Naturalization Examiner

Date

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In the Supreme Court
OF THE
United States

October Term 1972

No. 72-1652

United States Immigration and Naturalization Service, *Petitioner*

vs.

Marciano Haw Hibi, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MEMORANDUM OF MARCIANO HAW HIBI, RESPONDENT, IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Appeals and District Court are adequately reported in the petition. Findings and recommendations of the designated naturalization examiner, however, are merely proposed findings and recommendations in adversary proceedings which were rejected by the courts below and which should not be identified as opinions below.

JURISDICTION, QUESTION PRESENTED, STATUTES INVOLVED, AND STATEMENT OF THE CASE

These are adequately set forth in the petition.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

1. Denial of the writ would do no more than compel the Government to honor a long overdue promise made by Congress to encourage service in the armed forces of the United States during World War II.

2. The Commissioner of Immigration had a legal duty to implement Section 702 of the Nationality Act of 1940 by sending representatives to naturalize qualified members of the armed forces overseas. By revoking the authority of his representative in the Philippines in 1945, the Commissioner prevented Filipino soldiers from being naturalized. The Commissioner's conduct, in derogation of his duty, thwarted the will of Congress and violated the constitutional doctrine of the separation of powers.

3. The decision below was hardly a novel or inappropriate application of equitable estoppel. That principle has been applied any number of times to the Government in the interests of justice and good conscience. There is no difference, for purposes of estoppel, between an affirmative misrepresentation and the failure to speak or act when there is a duty to speak or act.

4. Denial of the writ would not have the impact pictured by petitioner upon the administration of

present immigration law. The figures suggested by petitioner with respect to the number of others who might benefit from the decision below have no foundation in fact and are totally wrong.

ARGUMENT

I.

The Deliberate Refusal of the Commissioner Of Immigration To Implement The Wartime Naturalization Law With Respect To Philippine Scouts in 1945 Violated The Constitutional Doctrine Of The Separation Of Powers.

Congress added Sections 701 through 705 to the Nationality Act of 1940 less than four months after the attack on Pearl Harbor. The new law had a very plain purpose. It was to offer American citizenship to certain non-citizens, many of whom could not otherwise qualify, in exchange for their service in the armed forces of the United States during the war.

Section 702 made special provision for soldiers and sailors on duty overseas who could not come to courts in the United States where persons ordinarily apply for naturalization. To make sure eligible servicemen overseas would have a chance to apply, Section 702 called for designation by the Commissioner of Immigration of representatives whose duty it was to naturalize servicemen in the overseas theaters of war.

The language of Section 702 makes two things readily apparent. The first is that servicemen were eligible for overseas naturalization only "while serving" overseas. Therefore, once a serviceman was dis-

charged, he would lose the benefits of 702 and, if he could not qualify through ordinary naturalization procedures, he might lose forever his chance to become an American citizen.

The second aspect of Section 702 follows from the first. The offer of citizenship made by the section would be without meaning unless qualified servicemen were notified of their right to apply and designated representatives were actually sent overseas to do their job while such servicemen were still on active duty overseas. Therefore, when the Commissioner deliberately revoked the authority of his representative to naturalize servicemen in the Philippines in 1945, he not only made it impossible for Mr. Hibi to accept the offer made to him by Congress, he also thwarted the will of Congress as expressed in 702 and effectively nullified a duly enacted provision of law.

Nowhere in the law is it written and from nothing in the law can it be implied that the Commissioner of Immigration had the discretion to withhold the benefits of Section 702. Plainly, Congress extended the offer of citizenship to *all* who might qualify. Clearly, the job of making that offer effective was placed in the hands of the Commissioner and he had neither statutory nor constitutional authority to ignore his unequivocally stated obligation.

The duty of the Commissioner to carry out the law is made plain not only by Section 702 itself. It is of course mandated by Article II, Section 3 of the Constitution, which commands the President to "take care that the Laws be faithfully executed . . ." Moreover,

the Commissioner's duty was also spelled out by Section 705 of the Act which directed the Commissioner "to make such rules and regulations, *as may be necessary to carry into effect the provisions of this Act.*"

Never in the history of the United States has any naturalization statute ever delegated to the Executive Branch any authority or discretion to choose among applicants for naturalization. Constitutional authority to provide for naturalization rests exclusively with Congress, and such authority is limited to the provision for a "uniform rule of naturalization." (Article I, Section 8, Constitution of the United States; *Chirac v. Chirac,* 15 U.S. 259 (1817).) A statute, therefore, which attempted to delegate to the Executive Branch the discretion to discriminate against a group of applicants who had met the statutory requirements would not be a uniform rule and therefore would be unconstitutional. In any event, no such delegation of authority was expressed or contemplated by the statutes at issue here.

Of course, given the conditions of war, it is quite true, as petitioner contends, that some soldiers and sailors were bound to miss the opportunities offered them by Section 702. Admittedly, battle conditions might have kept the requisite notice from getting to every single serviceman or might have prevented naturalization representatives from reaching every foxhole on every battlefront.

That, however, is not what this case is all about. No one is saying the Commissioner was required to do the impossible or that he neglected his obligation

to other servicemen in other parts of the world. Rather, this case involves the deliberate and calculated decision of the Commissioner of Immigration, with the consent of the Attorney General of the United States, to single out Filipino soldiers in the Philippines and to deny to *all* of them the opportunity to accept the offer of citizenship tendered them by Congress. In other words, there is a big difference between a good faith attempt to notify those who were qualified and the obligation to refrain from actively and intentionally depriving an individual or group of individuals from access to the person whose job it was to naturalize them.[1]

By deliberately refusing to do what Congress plainly wanted done, the Commissioner usurped the constitutional authority of Congress to enact the laws. The Commissioner also failed to obey his constitutional mandate to enforce the laws. As this Court has already said with respect to the separation of powers:

> "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither si-

[1] At least one immigration official recognized the Commissioner's conduct for what it was. The official was Edward J. Shaughnessy, special assistant to the Commissioner who wrote him on October 19, 1945 that withdrawal of the representative had created "the rather anomalous situation that while we recognize in law the legal right of these persons to the benefits under the Act we have from an administrative standpoint, made it impossible for such persons to acquire these benefits." (Clerk's Transcript of Record, p. 152.)

lent nor equivocal about who shall make the laws which the President is to execute."

(*Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).)

II.

Foreign Policy Considerations Could Not Justify The Commissioner's Decision To Withhold The Benefits Of Section 702.

There are any number of things wrong with petitioner's argument that "compelling foreign policy considerations" justified the Commissioner's action.

First of all, the Philippines was not then a foreign government. It remained a possession of the United States and was not fully self-governing until its independence on July 4, 1946. Filipinos were then nationals of the United States, a status not carrying the rights of citizenship, but commanding their allegiance nevertheless to the United States. There were, in other words, no principles of international comity at stake.

Moreover, Congress itself had provided for Philippine independence before the outbreak of World War II.[2] Congress knew that independence would follow soon after the war. Yet despite these considerations, it offered full American citizenship to Filipino soldiers. It may be assumed that by doing so Congress had no intention of attaching any strings to its offer that might involve Philippine independence or subsequent foreign policy consideration.

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[2]The Philippine Independence Act, March 24, 1934, 48 Stat. 456.

Nor do the cases cited by petitioner (*Tai Mui v. Esperdy,* 371 F.2d 772 (2d Cir. 1966) cert. den. 386 U.S. 1017 and *Cheng Ho Mui v. Rinaldi,* 408 F.2d 28 (3rd Cir. 1969)) support the view that the Commissioner acted within his statutory authority. While those cases sustained the Immigration Service in its decision not to open an office in the Far East to process applications for the admission of refugees, they offer no support to petitioner here because of a fundamental difference between the statutes involved.

In the present case, Section 702 created the right of qualified individuals to apply for naturalization, a right earned by them in exchange for honorable wartime service. Being a right, it could be waived only by the individual to whom it belonged. (*Johnson v. Zerbst,* 304 U.S. 458 (1938).)

No *quid pro quo,* or statutory right, however, is involved in the admission of refugees.

Nor did the Courts in *Tai Mui* and *Cheng Ho Mui* conclude that they were without the power to act. Rather, they decided not to intervene only because a showing of discrimination against Chinese refugees had not been established by the facts. Moreover, there is no statutory time limit upon the admission of refugees and the statute does not preclude applicants from traveling to and applying at other American outposts overseas. In the present case, however, the benefits of Section 702 were deliberately and specifically denied to Filipinos exclusively. Their eligibility to apply was limited to the time of their active

duty. And there was no way, while on active duty, they could seek out a naturalization representative in some other part of the world.

Second. Petitioner has failed to show the "compelling" nature of whatever foreign policy considerations the Commissioner of Immigration may have had in mind.

Obviously, the Commissioner was worried about the number of Filipinos who might leave the Philippines for America. But his conclusions were hardly warranted by the evidence of record. According to the record, the Commissioner's action was prompted by a letter dated September 10, 1945 written to him by the Chief of the Passport Division of the Department of State. The letter referred to a dispatch from the American Consul General in Manila concerning the apparently large number of Filipino soldiers who might wish to apply for citizenship under Section 702. The letter made no mention of any concern or objection by the Philippine Commonwealth Government.

Nevertheless, three days later, on September 13, 1945, the Commissioner wrote to the Attorney General asking for permission to revoke the authority of his naturalization representative in the Philippines. Noting that Filipino soldiers could be naturalized only by his representative in the Islands, the Commissioner concluded:

> "In view of the concern expressed by the Philippine Government, it is my belief that the situation might best be handled by revoking the authority previously granted to Mr. Ennis and by omitting

> to designate any representative authorized to confer citizenship in the Philippine Islands. This course would eliminate a source of possible embarrassment in our dealings with the Philippine people, who probably will be awarded independence in the near future."

The Attorney General gave his consent on September 26, 1945.[3]

What appears in the petition then as "compelling foreign policy considerations" is not shown by the record to have been any more than the Commissioner's hasty jump to an unwarranted conclusion. In any event, the record reveals no effort before summarily withdrawing the naturalization representative to obtain official information from the Philippines, no effort to make any reliable estimate of the numbers who might apply, or what effect their applications might really have upon the Philippine Government or U. S. relationships with it.

Third. Contrary to petitioner's comment at page 13 of the petition, the Commissioner and Attorney General were indeed compelled to ignore the wishes of the Philippine Government concerning the naturalization of Filipino soldiers.

They were compelled to ignore the wishes of the Philippine Commonwealth Government by Section 1999 of the Revised Statutes, which had incorporated into statutory form what we have recognized since our own independence as "the natural and inherent

[3]Copies of these letters are found in Clerk's Transcript of Record, pp. 144-146.

right of all people" to freely abandon the citizenship of one country for that offered by another country. To implement that historic principle, the statute proclaimed:

> "Any declaration, instruction, opinion, order or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic."[4]

The message of the statute then is crystal clear, and while Section 1999 was a response to claims made upon persons already naturalized as Americans by the countries of their former nationality, a "natural law" of expatriation is surely broad enough to protect against foreign interference those who ask for, but have not yet been given, the nationality of a new country. Plainly, the wishes of the Philippine Government, whatever they may have been, could not be controlling.[5]

III.

The Decision Below Was A Proper Application Of The Principle Of Equitable Estoppel.

The real issue before the Court is whether the Government should be compelled to honor the promise it made to Mr. Hibi that he could become an American citizen by reason of his service in the Army of the United States during World War II.

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[4]Act of July 27, 1868, 15 Stat. 223. The statute was in effect in 1945, 8 U.S.C.A. 800, 1942 ed.

[5]The War of 1812, of course, was fought in part to establish this very principle.

Equitable estoppel is only the name for a legal principle employed by the courts below to enforce that promise. Since it is a principle founded in "justice and good conscience" (2 *Pom.* Eq. Jur. Sec. 802), its application to the facts of this case can hardly be called unprecedented or erroneous.

The "vital principle", as this Court has declared, "is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted." (*Dickerson v. Colgrove,* 100 U.S. 578, 580 (1879).)

Therefore, while the events of this case may be described in the traditional terminology of equitable estoppel, it is the overriding commands of justice and good conscience which make the difference. Do justice and good conscience, in other words, require the government of the United States to honor the commitment it made to Mr. Hibi and other Filipino soldiers during the dark early days of World War II?

Plainly, they do. Respondent was eligible for naturalization only as long as he remained on active duty. With other Philippine Scouts, he could be naturalized only by a designated representative in the Philippines. The Commissioner knew this. Yet, notice of respondent's right to apply was never given him either personally or to the Unit in which he served, and the naturalization representative was withdrawn for the express purpose of preventing the naturalization of Mr. Hibi and other Filipino soldiers at the only time

they could apply, i.e., while on active duty. Petitioner, disregarding the basic nature of estoppel, asks how respondent could be prejudiced if he was unaware of his eligibility until it had lapsed (Petition, p. 13, footnote 7). But it was precisely respondent's lack of knowledge, coupled with withdrawal of the representative which in fact prejudiced respondent. Surely, respondent, after nearly five years of Army service would have no way of suspecting that he would give away his right to apply for citizenship by leaving the Army when the war was over. In orthodox estoppel terms, wasn't his decision to leave the Army a "detrimental reliance" upon the Government's failure to implement the provisions of Section 702?

The District Court found that respondent would have applied for citizenship had he been given a "fair opportunity". Thus, but for the Government's failure to do what the law clearly commanded, respondent would have been an American citizen for the past 28 years. "It is safe to assert" this Court has declared, "that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many, it is regarded as the highest hope of civilized men." (*Schneidermann v. United States,* 320 U.S. 118, 122.) If the Government's conduct in denying respondent the opportunity to enjoy American citizenship was not prejudicial, then what was it? Petitioner's concern obviously is not with the underlying equity of respondent's cause. Instead, petitioner would permit the Government to

escape its part of the wartime bargain on the basis of antiquated concepts of sovereign immunity, authority taken out of context, a meaningless distinction between affirmative misrepresentation and a failure to act at all, and finally, upon an inappropriate application of the doctrine of laches.

Such as it was, the tradition of governmental immunity began centuries ago when scholars of the day concluded that "The King cannot be estopped, for it cannot be presumed the King would do wrong to any person." (15 Halsbury's Laws of England (1956), quoting from Bacon's Abridgements.)

It is no wonder that courts in recent years have cast aside that kind of logic and have not hesitated to estop the Government in appropriate circumstances. This is particularly true in cases involving immigration and citizenship.[6]

Petitioner's reference to Professor Davis' view on the subject is taken out of context (Petitioner, p. 15). Far from suggesting the desirability of immunity to the Government's sovereign capacities, Professor Davis was attempting only to compare two decisions of this Court, *Federal Crop Insurance Corp. v. Mer-*

[6] *Brandt v. Hickel*, 427 F.2d 53 (9th Cir. 1970);
Hetzer v. I.&N.S., 420 F.2d 357 (9th Cir. 1965);
Tejeda v. I.&N.S., 346 F.2d 389 (9th Cir. 1965);
McLeod v. Peterson, 283 F.2d 180 (3d Cir. 1960);
Lee Wing Hong v. Dulles, 214 F.2d 753 (7th Cir. 1954);
Podea v. Acheson, 179 F.2d 306 (2d Cir. 1950);
Lee Bang Hong v. Acheson, 110 F. Supp. 48 (D.C. Hawaii 1951);
Lee Hong v. Acheson, 110 F. Supp. 60 (D.C.N.D. Cal. 1953).
These cases, incidentally, involved both the affirmative misrepresentation and a failure to act on the part of Government officials.

rill, 332 U.S. 380 (1947) and *Moser v. United States,* 341 U.S. 41 (1951).

Professor Davis' point was that the cases would have been easier to understand if the Court had reached opposite conclusions, for in *Merrill,* a case involving the Government's proprietary capacity, the Court ruled out estoppel whereas *Moser* involved a sovereign capacity of the Government and yet the Court accepted the idea of estoppel. Taken in context, his views cannot be considered authority favoring the concept of sovereign immunity.

Petitioner correctly asserts that the decision below would in this instance nullify 8 U.S.C. 1421(e). But that is the whole point of estoppel. For it would be unjust and unconscionable to require Mr. Hibi to comply with present day standards when the Government's own conduct prevented him from applying at the time when he was eligible. Estoppel is "a rule of justice which, in its proper field, prevails over all other rules." (*United States v. Georgia-Pacific Co.,* 421 F.2d 92, 96 (9th Cir. 1965.))[7]

Moreover, isn't it inconsistent of petitioner to insist now that Courts have no authority to by-pass 8 U.S.C. 1421(e) no matter what the injustice when the very same Immigration and Naturalization Service deliberately ignored and by-passed the explicit mandate of Sections 702 and 705?

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[7]In *Petition of Macachor,* No. 158858, unreported, (D.C.N.D. Cal. 1966) the Court granted a petition for naturalization on the principle of estoppel despite 8 U.S.C. 1421(e). Petitioner was not sufficiently upset with the decision to appeal.

Petitioner seems to agree that estoppel might be proper if Mr. Hibi had relied upon an express or "implied assertion" of Immigration officials. But does petitioner really see a difference between an affirmative misrepresentation and the failure to speak or act at all in circumstances creating a duty to speak or act? Estoppel has never been limited to affirmative misrepresentations.

> "Equitable estoppel, in the modern sense, arises from the conduct of a party, using that word in its broadest meaning as including his spoken or written words, his positive acts, and his silence or negative omission to do anything."
>
> 2 *Pom.* Eq. Jur. Sec. 802. See also *Wiser v. Lawler,* 189 U.S. 260, 270; *Dickerson v. Colgrove,* 100 U.S., 578, 580; and a host of cases cited in 31 Corp. Jur. Sec., Estoppel, Sec. 72, p. 439.

Finally, petitioner blames Mr. Hibi for waiting 20 years and argues that his petition ought to be denied on a theory of laches. Petitioner ignores the fact that Mr. Hibi did inquire at the American Embassy in Manila when he learned of his lost opportunity in 1946 or 1947. He was then told that he could not qualify for naturalization without entering the United States as an immigrant, a course made impossible for him by reason of our then restrictive immigration quotas. What more would petitioner have him do?

Laches would not be a proper argument anyway because it is appropriate only where delay has prejudiced the other side. Delay has not prejudiced peti-

tioner in this instance. For even assuming respondent were given notice, the Commissioner made it impossible for him to apply by withdrawing the naturalization representative while respondent was still on active duty. There is no way the passage of time could change that fact. If petitioner asks this Court to apply the doctrine of laches, should it not at least come to Court with "clean hands"? That would seem a more appropriate equitable principle for the Court to apply.[8]

IV.

The Decision Below Will Not Have The Impact Pictured By Petitioner.

The specter that petitioner has envisioned of thousands of Filipinos descending upon American shores if the decision below is affirmed is founded upon an erroneous statement of the numbers involved.

Had petitioner bothered to consult official sources rather than rely upon the estimates of anonymous State Department officials whose facts are wrong and whose mathematics are questionable, petitioner would have discovered the following:

By law, the number of Philippine Scouts as of December 7, 1941, was limited to 12,000. (Section 7,

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[8]On the subject of notice, petitioner refers to War Department Circulars requiring such notice and entry upon the individual's service record (Petition, pp. 10, 11). Respondent was re-enlisted into the Army of the United States on April 7, 1945 when American forces returned to the Philippines and after the specified procedures had been adopted. The required notation does not appear in his service record. Moreover, just why should these procedures have been limited to servicemen in the United States proper?

Act of Feb. 2, 1901, 31 Stat. 748, 757.) The actual strength of the Scouts on November 30, 1941, was 11,957. (*Morton,* U. S. Army in World War II, Fall of the Philippines, Department of the Army, 1953, p. 49.) Soon after the Japanese invasion, the full strength of 12,000 was reached. (*Morton, supra,* p. 71.)

During the Japanese occupation, the Scouts were scattered to all parts of the Philippine Islands. When U. S. forces returned in 1945, about 6,800 returned to active service before V-J Day.[9]

On December 28, 1945, Congress added Section 706 to the Nationality Act of 1940 and provided that eligibility under 701 and 702 would be limited to persons serving on active duty prior to that date. 59 Stat. 658.

Therefore, even though P.L. 190, 79th Cong. enacted on October 6, 1945, authorized an increase in the strength of the Philippine Scouts to 50,000, only those who had served before December 28, 1945 were entitled to the benefits of 702. In any event, according to Col. Jessup, only 200 men had enlisted in the new Scouts by mid-January, 1946 under the new authorization.

According to the petition itself, more than 4,000 eligible Scouts who had the good fortune to stay in the Army were naturalized in the Fall of 1946 when

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[9]This figure was given to us by Col. John E. Jessup, Jr., Chief of the Histories Division of the Department of the Army by letter dated July 24, 1973. Colonel Jessup could not account for the remaining 5,200, except to assume that many had been killed on Bataan, had died in prisoner camps or while fighting as guerrillas during the occupation, or were missing for a variety of reasons.

another representative was finally sent to the Philippines (Petition, p. 13 and App. 42a). Subtracting that number from the 6,800 who returned to duty there could now exist a maximum of 2,800 former Scouts who would be eligible for naturalization under 702 if the decision below is affirmed. By any reasonable estimate, it is difficult to imagine that any more than a fraction of such a number would be able to come to the United States to apply for naturalization at this late date. The best evidence of that is the fact that even though Mr. Hibi's petition has been pending for nearly six years, and news of his application long since has spread to the Philippines, only 139 men have filed similar applications in the United States, less than 25 per year.[10] Such figures hardly constitute an unbearable burden upon our present immigration administration.

Finally, petitioner's assertion that the decision below might apply to places other than the Philippines is also wrong. The wartime naturalization law did not apply to all alien servicemen, but only to noncitizens who had been previously admitted into the United States or its possessions or territories, including the Philippines. Moreover, there is no showing that the Immigration Service ever deliberately failed to send representatives to other theaters of war. It was only Filipinos, such as Mr. Hibi, who were singled out and denied their rights under the law.

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[10]These figures were supplied us by Edward Rudnick, Assistant Commissioner, Naturalization, Immigration and Naturalization Service.

CONCLUSION

Marciano Haw Hibi joined the Philippine Scouts in February 1941. Side by side with other Philippine and American soldiers, he took part in the gallant defense of Bataan and Corregidor, at the very moment Section 702 was being enacted. He endured the infamous death march following surrender of the Philippines. He was a prisoner of war. Abiding by his own duty, he rejoined the U. S. Army when the Army returned to the Islands in early 1945. If ever a person deserved the opportunity offered by Section 702 it is this brave man. It is puzzling, therefore, why the Government should wish to deny him now the benefits of that long overdue promise.

This Court has not hesitated before to hold the Government of the United States to its promise on the principle that "Great nations, like great men, should keep their word." (*Astrup v. I. & N.S.*, 91 S.Ct. 1583 at 1586 (1971).) Much American blood has been spilled in recent years to honor commitments of our Government. Thankfully no such sacrifice is required in this instance. The decision below is obviously correct, and consideration by this Court is unnecessary. The writ should be denied.

Dated, San Francisco, California,
August 6, 1973.

DONALD L. UNGAR,
Attorney for Respondent
Marciano Haw Hibi.

ESTHER M. KAUFMAN,
Of Counsel.

Supreme Court, U.
FILED
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MICHAEL RODAK, JR., C

In the Supreme Court

OF THE

United States

OCTOBER TERM 1973

No. 72-1652

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, *Petitioner*

vs.

MARCIANO HAW HIBI, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

In a *per curiam* opinion dated October 23, 1973, the Court granted the Government's petition for a writ of certiorari and without hearing argument summarily reversed the judgment of two courts below which had granted respondent's petition for naturalization.

At issue is whether the Government can deny the applicability of section 702 of the Nationality Act of 1940, a provision offering American citizenship to cer-

tain non-citizens, respondent among them, who were to serve honorably with the armed forces of the United States overseas during World War II.

Though the statute expired in 1946, long before respondent filed his application for naturalization, the courts below estopped the Government from asserting the statute's expiration date because the Commissioner of Immigration had taken certain actions which were specifically designed to and did in fact prevent respondent from applying in 1945. This Court reversed, finding that the Commissioner's actions did not constitute the kind of "affirmative misconduct" which might estop the Government from denying respondent American citizenship.

For the reasons which follow, respondent now asks the Court to set aside that part of its decision reversing the judgment below, to permit the filing of briefs and presentation of oral argument. Respondent further requests an opportunity to appear for oral argument on this petition for rehearing.

I

The issue of estoppel against the Government obviously was considered sufficiently important by the Court to grant certiorari. Yet the Court's opinion does not touch upon the fundamental conflict of interests which the issue presents, the question of fair play between the individual and his government and whether and under what circumstances even fair play may be compelled to give ground to a more important public interest.

No case could better illustrate the nature of that issue than this. For the undisputed record establishes the commission of an intentional act on the part of a high administrative official for the express purpose of denying an individual's legal right to apply for citizenship but for reasons the official considered to be in the public interest.

Throughout the proceedings below as well as in the Government's certiorari petition and in respondent's reply to it, the issue has always been presented in those terms. The Government has never denied that it was the affirmative act of the Commissioner of Immigration in revoking the authority of his naturalization representative in the Philippines in 1945 which prevented respondent from being naturalized. Instead, the Government has always sought to justify that act as being authorized by statute or implied from the Executive's authority in the field of foreign affairs.

Respondent won the unanimous judgment of two courts below upon the issue presented in the foregoing context. If this Court now chooses to resolve the issue on a new and different basis, i.e., whether the Commissioner's action constituted "affirmative misconduct," then it should at least permit the filing of briefs and presentation of argument directed toward the meaning of, and circumstances governing, the applicability of such a standard.

II

The expression "affirmative misconduct" has never before appeared in any decision concerned with the

issue of estoppel against the Government. This Court's use of that expression for the first time leaves unanswered a number of pertinent questions.

For example, is a finding of "affirmative misconduct" dependent upon the motivation or state of mind of the official involved? Can something less than "affirmative misconduct" ever give rise to an estoppel against the Government? Does the answer depend on the nature of the public interest to be served? Might not a failure to act, such as a deliberate failure to carry out a statutory duty, also be described as "affirmative" misconduct?

The answers to these questions are important because the word "misconduct" ordinarily implies a conscious or wilful wrongdoing. Yet the issue of estoppel against the Government is rarely prompted by anything more than an official's innocent misconception of the law.

Respondent has previously cited a list of cases estopping the Government in immigration and citizenship matters.[1] In none of them does it appear that the government official consciously intended to prejudice

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[1] *Hetzer v. I.&N.S.*, 420 F.2d 357 (9th Cir. 1965);
Tejeda v. I.&N.S., 346 F.2d 389 (9th Cir. 1965);
McLeod v. Peterson, 283 F.2d 180 (3d Cir. 1960);
Lee Wing Hong v. Dulles, 214 F.2d 753 (7th Cir. 1954);
Podea v. Acheson, 179 F.2d 306 (2d Cir. 1950);
Lee Bang Hong v. Acheson, 110 F. Supp. 48 (D.C. Hawaii 1951);
Lee Hong v. Acheson, 110 F. Supp. 60 (D.C.N.D. Cal. 1953).

the party involved. Not even in *Montana v. Kennedy*, 366 U.S. 308, 314, 315, the case cited in the Court's opinion as illustrating the kind of misconduct which might estop the Government, can it be said the government official was guilty of a consciously wrongful act.

It is therefore difficult to understand how the events of *Montana v. Kennedy*, supra, might constitute "affirmative misconduct" when the events of this case apparently do not. In *Montana*, there was only an unsubstantiated allegation made by a lady who apparently took the ambiguous statement of an American Consul to mean he would not issue her a passport. But here, the undisputed record establishes that the Commissioner of Immigration acted deliberately and intentionally and for the express and specific purpose of denying Filipino soldiers their right to apply for American citizenship, a right the Commissioner knew them to have and which he knew they would lose as a result of his *affimative* act of withdrawing the authority of his naturalization representative.

III

It is incorrect, therefore, to characterize the actions of the Commissioner of Immigration as an unintentional failure to publicize the rights of Filipino soldiers or as a failure to keep a naturalization officer in the Philippines during "all of the time" respondent was eligible. The conduct of the Commissioner, i.e., the revocation of the naturalization officer's authority when he had barely begun to naturalize soldiers in the

Philippines, was misconduct of the most affirmative kind.

If the "affirmative misconduct" of its officials must indeed be established in order to estop the Government, and if the Supreme Court of the United States cannot discover that kind of misconduct in the circumstances of this case, then what recourse can there be for any individual who finds himself aggrieved by the Government.

Petitions for rehearing, we know, are not meant to re-argue lost causes, and the Court has already rendered its opinion. Nevertheless, we trust that such an admonition will not apply to the discussion which follows, for this respondent has not had a hearing at all. Therefore, we respectfully ask the Court to reconsider the following circumstances in light of the foregoing discussion concerning the meaning and applicability of the "affirmative misconduct" standard.

1. The Commissioner of Immigration, as the Court's opinion itself notes, was charged by Congress with administering the offer of citizenship proclaimed by section 702. If this means anything at all, it means the Commissioner had a plain duty to make a naturalization representative available to qualified servicemen.

2. Respondent was qualified and would have accepted that offer had the means, i.e., the presence of a naturalization officer, been made available to him. The District Court found that to be the fact.

3. No sooner had the naturalization officer begun his work in the Philippines than his authority was revoked by the Commissioner of Immigration.

4. The wrong done to respondent cannot be characterized in terms of inadvertent or excusable failures. This was not a mere failure to publicize respondent's rights or a mere failure to keep a naturalization officer in the Philippines during "all of the time" respondent was eligible. Rather, the wrong done to him was the conscious, intentional, deliberate and affirmative act of withdrawing the naturalization officer just when respondent might have applied. Moreover, this was done for the express and specific purpose of doing exactly what it did do—to prevent respondent from asserting a right that was legally his.

In other words, there is a big difference between a good faith, but unsuccessful effort, to naturalize those who might qualify and an obligation to refrain from actively and intentionally blocking qualified servicemen from access to the person whose job it was to naturalize them.

IV

Ultimately the issue is whether the Government of the United States shall be held to its promise. That issue need not be expressed in terms of estoppel at all. "Great nations, like great men," this Court has said, "should keep their word." *Astrup v. I.&N.S.*, 91 S.Ct. 1583, 1586.

This respondent put his life on the line for the United States during the darkest moments of the war.

He has kept his half of the bargain. He has won t
right to citizenship by unanimous judgment of t
two courts below. Has he not earned the right a
to be fully heard by this Court?

Dated, San Francisco, California,
November 14, 1973.

DONALD L. UNGAR,
Attorney for Respondent
Marciano Haw Hibi.

ESTHER M. KAUFMAN,
Of Counsel.

Certificate of Counsel

As counsel for respondent, I hereby certify that I am a member in good standing of the Supreme Court of the United States and that this petition for rehearing is presented in good faith and not for delay.

Dated, San Francisco, California,
November 14, 1973.

Donald L. Ungar,
Attorney for Respondent
Marciano Haw Hibi.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE *v.* HIBI

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-1652. Decided October 23, 1973

Neither the failure to fully publicize the rights to naturalization afforded by the Nationality Act of 1940 to noncitizens who served in the United States Armed Forces during World War II nor the failure to have an authorized naturalization representative stationed in the Philippine Islands during the time such rights were available, estopped the Government from relying on the fact that the deadline for filing naturalization applications such as respondent Filipino's had expired more than 20 years earlier.

Certiorari granted; 475 F. 2d 7, reversed.

PER CURIAM.

Respondent filed his petition for naturalization in the United States District Court for the Northern District of California on September 13, 1967. The District Court granted the petition, rejecting the negative recommendation of the naturalization examiner appointed by the Attorney General pursuant to § 335 of the Immigration and Nationality Act, 66 Stat. 255, 8 U. S. C. § 1446. The Court of Appeals affirmed, 475 F. 2d 7 (CA9 1973), holding that even though the deadline fixed by Congress for the filing of applications such as respondent's had expired more than 20 years earlier, petitioner was "estopped" from relying on this fact.

Respondent was born in Manila in 1917, and in February 1941 enlisted in the Philippine Scouts, a unit that was part of the United States Army. He was captured by the Japanese Armed Forces and released after six months' internment. In April 1945 after the liberation of the Philippines by Allied Forces, he rejoined the Scouts

and served until his discharge in December 1945.

Sections 701 and 702 of the Nationality Act of 1940, as amended, provided for the naturalization of noncitizens who served honorably in the Armed Forces of the United States during World War II.* Section 701

*Sections 701, 702, and 705 of the Nationality Act of 1940, added by the Second War Powers Act, 1942, 56 Stat. 182, as amended, 8 U. S. C. §§ 1001, 1002, 1005 (1940 ed., Supp. V), provided in pertinent part:

Sec. 701. "[A]ny person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war and [w]ho shall have been at the time of his enlistment or induction a resident thereof and who (a) was lawfully admitted into the United States, including its Territories and possessions, or (b) having entered the United States, including its Territories and possessions, prior to September 1, 1943, being unable to establish lawful admission into the United States serves honorably in such forces beyond the continental limits of the United States or has so served may be naturalized upon compliance with all the requirements of the naturalization laws except that (1) no declaration of intention, no certificate of arrival for those described in group (b) hereof, and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet any educational test; . . . *Provided, however*, That . . . (3) the petition shall be filed not later than December 31, 1946. . . ."

Sec. 702. "During the present war, any person entitled to naturalization under section 701 of this Act, who while serving honorably in the military . . . forces of the United States is not within the jurisdiction of any court authorized to naturalize aliens, may be naturalized in accordance with all the applicable provisions of section 701 without appearing before a naturalization court. The petition for naturalization of any petitioner under this section shall be made and sworn to before, and filed with, a representative of the Immigration and Naturalization Service designated by the Commissioner or a Deputy Commissioner, which designated representative is hereby authorized to receive such petition in behalf of the Service, to conduct hearings thereon, to take testimony concerning any matter

exempted certain alien servicemen who served outside the continental limits of the United States from some of the usual requirements for naturalization, including those of a period of residence in the United States and literacy in English. An amendment to this section specified that all petitions filed under it had to be filed no later than December 31, 1946. Section 702 provided for the overseas naturalization of persons eligible for naturalization under § 701 who were not within the jurisdiction of any court authorized to naturalize aliens; naturalization under § 702 could take place only during active service in the armed forces. Section 705 authorized the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, to make such rules and regulations as were necessary to carry into effect the provisions of the Act.

Respondent entered the United States for the first and only time on April 25, 1964, more than 17 years after the expiration of the time limit established by Congress for claiming naturalization under the "exemptions of the Act." He entered on a visitor-for-business visa, which expired on June 30, 1964. His subsequent petition for naturalization was based on the assertion that the Government was estopped from relying on the statutory time limit which Congress had attached to the provisions under which he claimed. The estoppel was said to arise from petitioner's failure to advise him, during the time he was

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touching or in any way affecting the admissibility of any such petitioner for naturalization, to call witnesses, to administer oaths, including the oath of the petitioner and his witnesses to the petition for naturalization and the oath of renunciation and allegiance prescribed by section 335 of this Act, and to grant naturalization, and to issue certificates of citizenship . . . ."

Sec. 705. "The Commissioner, with the approval of the Attorney General, shall prescribe and furnish such forms, and shall make such rules and regulations, as may be necessary to carry into effect the provisions of this Act."

eligible, of his right to apply for naturalization, and from petitioner's failure to provide a naturalization representative in the Philippines during all of the time respondent and those in his class were eligible for naturalization. The District Court adopted respondent's contention, and its conclusions were upheld by the Court of Appeals.

It is well settled that the Government is not in a position identical to that of a private litigant with respect to its enforcement of laws enacted by Congress.

> "As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest. . . . A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or to remove a cloud from it." *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409.

Here the petitioner has been charged by Congress with administering an Act which both made available benefits of naturalization to persons in respondent's class and established a cutoff date for the claiming of such benefits. Petitioner, in enforcing the cutoff date established by Congress, as well as in recognizing claims for the benefits conferred by the Act, is enforcing the public policy established by Congress.

While the issue of whether "affirmative misconduct" on the part of the Government might estop it from denying citizenship was left open in *Montana* v. *Kennedy*, 366 U. S. 308, 314, 315, no conduct of the sort there adverted to was involved here. We do not think that the failure to fully publicize the rights which Congress accorded

under the Act of 1940, or the failure to have stationed in the Philippine Islands during all of the time those rights were available an authorized naturalization representative, can give rise to an estoppel against the Government.

Respondent's effort to claim naturalization under a statute which by its terms had expired more than 20 years before he filed his lawsuit must therefore fail. The petition for certiorari is granted and the judgment of the Court of Appeals is reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

The Court today summarily reverses the decision of the Court of Appeals, which found that the Government was estopped from denying citizenship to respondent under the Nationality Act of 1940.[1] The Court reasons that estoppel is not even arguably applicable because there was no "affirmative misconduct" on the part of the United States; it implies that there were merely failures to "fully publicize" the rights given by the Act and "to have stationed in the Philippine Islands during all of the time those rights were available an authorized naturalization representative." Failures of this kind could, perhaps, be excused if caused by the exigencies of war as long as good-faith efforts to carry out the provisions of the Act had been made.

But the Court ignores the record and the decisions below when it speaks only of these failures. In 1942, Congress amended the Nationality Act of 1940 to extend the benefits of citizenship to individuals who had fought in the Armed Forces of the United States during World War II, authorizing the appointment of naturalization

[1] C. 876, 54 Stat. 1137.

officers to confer these benefits on noncitizens outside the jurisdiction of a naturalization court.[2] Between 1943 and 1946, these officers traveled from post to post, through England, Iceland, North Africa, and the islands of the Pacific, naturalizing thousands of foreign nationals pursuant to the mandate of Congress.

The story in the Philippines was different. After the Japanese occupation of the Philippines ended, an American vice-consul was authorized to commence naturalization proceedings in 1945. Almost immediately thereafter, the Philippine Government expressed its concern about

[2] As amended, Act of Mar. 27, 1942, c. 199, §§ 701–705, 56 Stat. 182, the Nationality Act waived certain normal requirements for naturalization, such as residency in the United States and literacy in English for noncitizens who had served in the United States Armed Forces. *Id.*, § 701. Section 702 of the amended Act provided that aliens could claim these benefits even when, like respondent, they were outside the jurisdiction of a naturalization court, but only so long as they were in active service in the Armed Forces; this section also explicitly authorized the designation of naturalization officers to effectuate its purposes:

"During the present war, any person entitled to naturalization under section 701 of this Act, who while serving honorably in the military or naval forces of the United States is not within the jurisdiction of any court authorized to naturalize aliens, may be naturalized in accordance with all the applicable provisions of section 701 without appearing before a naturalization court. The petition for naturalization of any petitioner under this section shall be made and sworn to before, and filed with, a representative of the Immigration and Naturalization Service designated by the Commissioner or a Deputy Commissioner, which designated representative is hereby authorized to receive such petition in behalf of the Service, to conduct hearings thereon, to take testimony concerning any matter touching or in any way affecting the admissibility of any such petitioner for naturalization, to call witnesses, to administer oaths, including the oath of the petitioner and his witnesses to the petition for naturalization and the oath of renunciation and allegiance prescribed by section 335 of this Act, and to grant naturalization, and to issue certificates of citizenship . . . ." *Id.*, § 702.

Filipino men leaving the Territory after being granted American citizenship. In response to these concerns, the Commissioner of Immigration, on September 13, 1945, wrote a letter to the Attorney General recommending that the "situation . . . be handled by revoking the authority previously granted [the vice-consul] and by omitting to designate any representative authorized to confer citizenship in the Philippine Islands. . . ." The Commisioner's recommendation was approved by the Attorney General on September 26, 1945, and the authority of the vice-consul to naturalize alien servicemen immediately revoked.

Because of this action, there was no authorized naturalization representative in the Philippines. The District Court found as a fact that respondent, had he known about his right to be naturalized while he was in the Armed Forces and had means been available, would have applied for naturalization. Instead, with no means available, respondent was discharged from the Armed Forces in December 1945, thereby losing his right to claim citizenship under § 702 of the 1940 Act.[3]

The Court's opinion ignores the deliberate—and successful—effort on the part of agents of the Executive Branch to frustrate the congressional purpose and to deny substantive rights to Filipinos such as respondent by administrative fiat, indicating instead that there was no affirmative misconduct involved in this case.

The record does not support that conclusion. I would grant certiorari and put the case down for oral argument.

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[3] See n. 2, *supra*. It was not until August 1946, eight months after respondent's discharge, that a naturalization agent was reappointed for the Philippines and a good-faith effort made to naturalize Filipinos under § 702 of the Act. In four months, 4,000 Filipinos took advantage of the opportunity.